TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 504. 192

THE SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN AND TRUST COMPANY, PETITIONERS,

vs.

THE TRUST COMPANY OF NORTH AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FILED NOVEMBER 6, 1897.
CERTIORARI AND RETURN FILED DECEMBER 20, 1897.

(16,717.)

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1328

(16,717.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 17, 1898.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1897, of said court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the third day of May, A. D. 1897, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

United States
Circuit Court
of Appeals
Eighth Circuit.

Attest:
JOHN D. JORDAN,
Clerk U. S. Circuit Court
of Appeals, Eighth Circuit.

Be it remembered, that heretofore, to wit, on the fourteenth day of May, A. D. 1896, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of The Sioux City Terminal Railroad and Warehouse Company et al., Appellants, vs. The Trust Company of North America, Appellee, which said transcript, as printed pursuant to the stipulation of the parties for the use of the court on the hearing of this cause, is in the words and figures following, to wit:

a United States Circuit Court of Appeals, Eighth Circuit.

STIPULATION.

Sioux City Terminal Railroad & Warehouse Company et al., Appellants,

v.

Trust Company of North America, Appellee.

It is hereby stipulated by and betwen the appellants and appellee that in printing the record herein, the Clerk shall omit therefrom Exhibits "A" and "B" to the bill of complaint of the Trust Company of North America filed in Number 142 Equity on April 17, 1894, and insert in the printed record in lieu thereof the following:

"Exhibits 'A' and 'B' to the foregoing complaint are the same respectively as Exhibits 'A' and 'Aa,' to the evidence of witness John Cadwalader, page —— of transcript, and page —— of printed record."

And shall also omit Exhibits "1" and "2" to the petition of intervention of the Trust Company of North America filed in Number 138 December 18, 1893, and insert in the printed record in lieu thereof the following:

b "Exhibits '1' and '2' are the same respectively as Exhibits 'A' and 'Aa,' to the evidence of the witness John Cadwalader, found on page —— of the transcript and page —— of printed record."

Either party hereto may request the printing of any of the above Exhibits in full at any time hereafter should he so desire with the same force and relation to the case as though originally printed.

This stipulation need not be printed.

6/1/96.

HENRY J. TAYLOR,
Solicitor for appellants.
JOY, CALL & JOY,
Solicitors for appellee.

801. United States Circuit Court of Appeals. Eighth Circuit. Sioux City Terminal Railroad & Warehouse Company et al., Appellants, v. Trust Company of North America, Appellee. Stipulation as to printing. Filed Jun. 3, 1896. John D. Jordan, Clerk.

1 United States of America.

To the Trust Company of North America—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to the appeal filed in the office of the Circuit Court of the United States for the Western Division of the Northern District of Iowa, wherein the Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard, trustee and E. H. Hubbard, assignee of the Union Loan and Trust Company, are appellants and plaintiffs in error, and you are appellee and defendant in error, to show cause if any there be why the judgment rendered against the said appellants and plaintiffs in error as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, Judge of the Circuit Court of the United States for the 8th Circuit, this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

AMOS M. THAYER,
Circuit Judge.

2 Personal service of the within citation accepted and the receipt of a true copy thereof acknowledged this 23 day of March, 1896.

JOY, CALL & JOY,
Attys. for Trust Company of North America.
F. E. GILL.
Atty. for Herman & Savage.
WRIGHT & HUBBARD,
Attys. for Defendants.
MARKS & MOULD,
Attys. for part Defts.
J. O'D. ROSSA,
Atty. for Coughlin & Sullivan.
LYNN, SULLIVAN & FOLEY,
SPALDING, TAYLOR & BURGESS,
Attorneys for the parties other than Appellants.

Nos. 138 and 142. Equity. Consolidated. Trust Co. of North America vs. Sioux City Ter. Ry. & W. Co. et al. Citation on Appeal. Filed Apr. 2", 1896. A. J. VanDuzee, Clk. By J. H. Bolton, Dpty.

3 The United States of America,
Northern District of Iowa—ss.

Pleas before the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, at a term begun and holden at Sioux City in said District on the First Tuesday of October A. D. 1893, before the Hon. O. P. Shiras, Judge of the Northern District of Iowa.

First National Bank of Montpelier, Vermont; First National Bank of Kewanee, Illinois; Garrett County Bank of Oakland, Maryland; Naumkeag National Bank of Salem, Massachusetts; Central National Bank of Middletown, Connecticut; and Third National Bank of St. Louis, Missouri, Plaintiffs,

vs.

Sioux City Terminal Railroad & Warehouse Company; Union Loan and Trust Company; E. H. Hubbard, Assignee of the Union Loan and Trust Company, and Warwick Hough, and S. J. Beals, receivers of the Sioux City & Northern Railroad Company, as their capacity and interest may appear, Defendants.

The Trust Company of North America, Plaintiff.

vs.

The Sioux City Terminal Railroad & Warehouse Company; Warwick Hough, receiver of the Sioux City Terminal Railroad & Warehouse Company; the Union Loan and Trust Company; The Sioux City & Northern Railroad Company; Warwick Hough, one of the receivers of the Sioux City & Northern Railroad Company; Samuel J. Beals, one of the Receivers of the Sioux City & Northern Railroad Company; The Manhattan Trust Company; The First National Bank of Montpelier, Vermont; The First National Bank of Kewanee, Illinois; The Garret County Bank of Oakland, Maryland; The Naumkeag National Bank of Salem, Massachusetts; The Central National Bank of Middletown, Connecticut; The Third National Bank of St. Louis, Missouri; E. H. Hubbard, Trustee; Charles E. Faeth; Beach & Weld, a co-partnership consisting of S. J. Beach and Charles L. Weld; R. & J. Barret, a co-partnership consisting of Robert Barret and James Barrett; Coughlin & Sullivan, a co-partnership consisting of Jeremiah J. Coughlin and Joseph H. Sullivan; J. H. Queal & Company; E. C. Wakefield; Sioux City Electrical Supply Company; E. A. Conway; Carr, Ryder & Engler Company; W. H. Burns; Hornick, Hess & More; Hopper & McNiel, a co-partner-

4 ship consisting of Charles T. Hopper and Henry C. McNiel; Sioux City Brick & Tile Works; Grant Breese & Company, a co-partnership; Gillette-Herzog Manufacturing Company; John G. Olson; James D. Spalding; Hermann & Savage, a co-partnership consisting of Adolph Hermann and William H. Savage; Tom Ness; Fletcher & Hutchins Company; John Sutton; Fred S. Martin; Webb Bros., a co-partnership consisting of James D. Webb and Walter I. Webb; A. Eckert; Ed. Moe; Peter Lorvig; L. C. Lancaster; Gust Nelson; G. Davelaar; C. A. Nokes; F. Russell; C. F. Nelson; C. Peterson; H. Wolf; D. Wolf; G. Ingebregtson; Osmond Olson; D. Payette; Louis Hanson; T. R. Hockinsmith; C. W. Lidster; Geo. Legvold; C. Seidel; Frank Draper; Paul Ekle; John Furre; Joseph Josseyln; Oscar Lindblom; Ed. Marion; J. Nettum; John Ohlund; John Volz; L. Kaarrus; Louis Soiseth; H. Wood; Henry Soiseth; George Robinson; Frank Wilson; S. Sorenson; E. Stran; F. Dewey; Martin Eide; Clarence Holt; M. Senfelder; VanBrunt & Howe, and J. A. L. Waddell, a co-partnership; The First National Bank of Shenandoah, Pennsylvania; The Lock Haven Trust and Safe Deposit Company; Bank of Lansing; T. P. Murphy; Dye Brothers, a co-partnership; First National Bank of Erie, Pennsylvania; First National Bank of Sharon, Pennsylvania; Girard National Bank of Philadelphia, Pennsylvania; The First National Bank of Orwigsburg, Pennsylvania; The Kenduskeag National Bank of Maine; National Union Bank of Maryland of Baltimore, Maryland; Tolerton & Stetson Company; C. F. Hoyt; Martha Hoyt; Fidelity Loan & Trust Company; The Credits Commutation Company; Western Tube Company; Clarence S. Argo; Reel & Bartle, a co-partnership; and William Watts, Defendants.

Nos. 138 and 142 Equity.
Consolidated.

Be it remembered, that heretofore to wit on the 10th day of October 1893, there was filed in the office of the Clerk of the United States Circuit Court, in and for the Northern District of Iowa, a Bill of Complaint, in the cause No. 138, which Bill of Complaint is in the words and figures following, to wit:

5 In the Circuit Court of the United States in and for the Northern District of Iowa. Western Division.

BILL OF COMPLAINT.

First National Bank of Montpelier, Vermont, First National Bank of Kewanee, Illinois, Garrett County Bank, of Oakland, Maryland, Naumkeag National Bank of Salem, Massachusetts, Central National Bank of Middletown, Connecticut, Third National Bank of St. Louis, Missouri, Plaintiffs,

In Equity. vs.

Sioux City Terminal R. R. & Warehouse Co., Union Loan & Trust Company, and E. H. Hubbard, Assignee of the Union Loan and Trust Company, and Warwick Hough and S. J. Beals, Receivers of the Sioux City and Northern Railroad Company, as their capacity and interest may appear, Defendants.

To the Honorable Judges of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division thereof.

Your orators, The First National Bank of Montpelier, Vermont, corporation, created under and by virtue of the laws of the United States, of the State of Vermont, and The First National Bank of Kewanee, a Corporation created under and by virtue of the laws of the United States, a resident of the State of Illinois, and The Garrett County Bank, a corporation created under and by virtue of the laws of the United States, a resident of the State of Maryland, and the Naumkeag National Bank, a corporation created under and by virtue of the laws of the United States, a resident of the State of Massachusetts, and the Central National Bank, a corporation created under and by virtue of the laws of the United States, a resident of the State of Connecticut, and the Third National Bank of St. Louis, a corporation created under and by virtue of the laws of the United States, a resident of the State of Missouri, on their own behalf, and on behalf of such other creditors and parties in interest as may elect to join in the prosecution of this suit, bring this, their bill of complaint, against the defendants, the Sioux City Terminal R. R. & Warehouse Co., a corporation organized under and by virtue of the laws of the State of Iowa, and having its principal and only place of business at Sioux City, Woodbury County, in said State; and the Union Loan & Trust Co., a corporation organized under and by virtue of the laws of the State of Iowa, and having its principal and only place of business at Sioux City, Woodbury County, in said State, and E. H. Hubbard, Assignee of the

Union Loan & Trust Co., a citizen and resident of the State of Iowa, and thereupon your orators complain and differ:

6 That the said defendant, the Sioux City Terminal R. R. & Warehouse Co., is indebted to your orators in the sum of fifty-eight thousand (58,000) dollars upon its certain promissory notes, made and executed in favor of the said Union Loan & Trust Co., aggregating the sum of fifty-eight thousand dollars, copies of which notes are hereunto attached, marked Exhibits A to N and made parts of this complaint; that said notes are owned as follows, to wit: By said First National Bank of Montpelier, Exhibits A, B, C, D, E, F, and by said First National Bank of Kewanee, Exhibits G, H, I, J, and by said Naumkeag National Bank, Exhibit L, and by said Garrett County Bank, Exhibit K, and by said Central National Bank, Exhibit M, and by said Third National Bank of St. Louis Exhibit N. That no part of said notes have been paid, and that the whole amount thereof, principal and interest, is now due.

II.

That said notes, together with other notes of like character aggregating in all the sum of $718,000 were at various times during the years of 1892 and 1893, issued by said defendant, the Sioux City Terminal R. R. & Warehouse Co., to the said Union Loan & Trust Co., and were by it negotiated and sold to various banks and individuals and are now held and owned by over one hundred banks, firms and individuals at various places in the United States. That all of said indebtedness, the whole amount, excepting the sum of about $13,500 is now past due and unpaid, and a large number of said notes so past due have been protested for the non-payment thereof.

III.

That all of said paper so negotiated through the said Union Loan & Trust Co. bore its indorsement in the same form as that appearing upon Exhibits A to N, and was all issued under the statement and representation on the part of the said Union Loan & Trust Co., that the same was secured by ample collateral, but that in fact, at the time of the issuance of said paper, the only direct security held therefor by the said Union Loan & Trust Co. were notes aggregating $260,000 secured by a second mortgage upon the property of the said Sioux City Terminal R. R. & Warehouse Co., subject to a prior mortgage thereon of $1,250,000. That on or about the 24th day of April, A. D. 1893, for the purpose of further securing the said notes, the said Sioux City Terminal R. R. & Warehouse Co., duly authorized, executed its mortgage upon all of its

property rights and franchises, to the said Union Loan & Trust Co., for the sum of $750,000, said mortgage being intended to secure said notes so sold and outstanding in the hands of your orators and others, and also to secure an overdraft of about $10,000 in the hands of the said Union Loan & Trust Co., the amount of said indebtedness and said over-draft not being then accurately ascertained, but afterwards found and determined to be the sum of $718,000 upon said notes, and the sum of $10,000 for said overdraft. That as representing the indebtedness secured by said mortgage, there were made and executed therewith notes of the said Sioux City Terminal R. R. & Warehouse Co., aggregating the sum of $750,000 all bearing date April 24th, 1893, and falling due five years after date thereof. That your orators attach hereto and make a part of this bill of complaint a copy of said mortgage marking same Exhibit —— and that at the time of the execution of said mortgage the said Sioux City Terminal R. R. & Warehouse Co. was the owner in fee of the property described therein, and of other valuable properties rights and credits and
7 is still the owner thereof.

IV.

That the purpose and intent of the said mortgage was to secure your orators and other creditors of the Sioux City Terminal R. R. & Warehouse Co., holding paper of like character, upon the property, rights and franchises of the said Sioux City Terminal R. R. & Warehouse Co., and that said notes mentioned accompanying said claim were only intended to represent the indebtedness to said orators and others, and that of right and in equity said mortgage should be treated as directly securing notes and indebtedness to your orators and other creditors of like character.

V.

That all property rights and franchises of the said Sioux City Terminal R. R. & Warehouse Co. are subject to a mortgage to the Trust Company of North America, of Philadelphia, Pennsylvania, for the sum of $1,250,000 which is a first mortgage upon said property. That at some time in the year 1890, the precise date being to your orators unknown, the said Sioux City Terminal R. R. & Warehouse Co. purported to make a lease of all its properties, rights and franchises, to the Sioux City & Northern Railroad Co. under the terms of which the said Sioux City & Northern Railway Co. claims to hold all the property, rights and franchises subject to payment to said Sioux City Terminal R. R. & Warehouse Co., by the said Sioux City & Northern Railroad Co., of an annual

rental of $90,000 per year payable quarterly (under said alleged lease). That there have been filed against the said Sioux City Terminal R. R. & Warehouse Co., liens of material men, laborers and mechanics, for sums aggregating more than $90,000. That there will accrue and fall due upon the said first mortgage on the first day of January A. D. 1894, $37,500 in interest. That taxes have been assessed against the property, and will fall due on the first day of January, A. D. 1894, aggregating the sum of ———— dollars. That the only income of the said Sioux City Terminal R. R. & Warehouse Co. consists of the said $90,000 of rental payable by the Sioux City & Northern Railroad Co. That said Company has defaulted in the payment of the rental falling due on the first day of October, 1893, and will, as your orators are informed, default in the next installment of rental and that said Sioux City Terminal R. R. & Warehouse Co. will be without any means whatever to provide for the payment of the interest, taxes or liens which are charges against its property, and has no means with which to pay any portion of the indebtedness held by your orators and other creditors, and is in fact wholly insolvent.

VI.

That all the stock of the said Sioux City Terminal R. R. & Warehouse Co. (excepting ten shares reserved and held by A. S. Garretson and his associates as qualification shares) is held by the said Sioux City & Northern Railroad Co., which Company is in fact, by virtue of its interest as a stockholder as aforesaid, substantially the owner and controller of the said Sioux City Terminal R. R. & Warehouse Co., in addition to being lessee thereof, as hereinbefore stated. That said Sioux City & Northern Railroad Co., on the 5th day of October A. D. 1893, was placed in the hands of Warwick Hough and S. J. Beals, as Receivers, but that by the express terms of such appointment, the same was without prejudice to the rights
8 of any mortgagee of the said Sioux City Terminal R. R. & Warehouse Co., to proceed by foreclosure or otherwise for the protection of his interests.

VII.

That on or about the 25th day of April 1893, the said Union Loan & Trust Co. made an assignment for the benefit of all of its creditors, to the said defendant E. H. Hubbard, as Assignee, and that said defendant as such Assignee succeeded to all the right, title and interest of the said Union Loan & Trust Co. in and to the said mortgage, and became thereby trustee for your orators and other creditors of like character,

for the enforcement of said mortgage, and the protection of their interests arising under and by virtue thereof. And that your orators have made application to the said E. H. Hubbard as such Assignee, requesting him to bring action upon said mortgage for foreclosure thereof, and for the protection of the interests of your orators, or to permit them so to do in his name, and the said Assignee has expressly refused and declined to take such action, and your orators have thus been compelled, for the protection of themselves and other creditors, to institute this action for themselves.

VIII.

That for the proper preservation of said property for the benefit of all creditors thereof, and especially for the protection of the rights and interests of your orators, and like creditors, it is essential that this Court should take immediate possession thereof, by a Receiver to be by it appointed.

And your orators therefore pray:

1st. That the rights of each and all of them, and that the rights of each and all of said creditors of the said defendant, the Sioux City Terminal R. R. & Warehouse Co., be ascertained and protected, and the relative priorities of the several liens upon the said property be ascertained and settled, and that your orators be granted judgment against the said defendants upon the said notes, and such other and further relief as may be equitable.

2nd. That the said mortgage to the defendant, the Sioux City Terminal R. R. & Warehouse Co., to the said Union Loan & Trust Co., be foreclosed as against all of said defendants, and that the property covered thereby or so much thereof as may be necessary to pay all claims of your orators and other creditors of like character be sold under a decree and order of this Court for that purpose.

3d. That for the protection of the interest of your orators and of the said defendant the Sioux City Terminal R. R. & Warehouse Co., a Receiver or Receivers may be appointed by the Court to take possession of all property, rights and credits, goods and chattels and of all rights in action of the said defendant, the Sioux City Terminal R. R. & Warehouse Co., of every kind and nature with full power and authority to administer the same, to take charge of said property to collect all rentals, and to enforce all rights of action which should of right belong to said defendants under the orders and direction of this Court to be from time to time given.

4th. That said complainants, your orators, and those who may join with them as plaintiff, shall have such other and further relief as may be appropriate in the premises and as may to justice and equity appertain.

5th. That a Writ of Subpoena may be granted to said complainants to be directed to said defendants and each of them, to wit: The Sioux City Terminal R. R. & Warehouse Co., of Sioux City, Iowa; to The Union Loan & Trust Co., of Sioux City, Iowa; to E. H. Hubbard Assignee of said Union Loan & Trust Co., of Sioux City, Iowa; to appear on a certain
9 day before this Court, and then and there full, true and direct answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived. That notice shall also be given to said Warwick Hough and S. J. Beals, Receivers of the Sioux City & Northern Railroad Co., at Sioux City, Iowa, that they may appear and assert such interests, if any, as they may have in the premises, and that said several defendants shall perform and abide by such orders, direction and decree herein as may to the Court seem proper; and your orators will ever pray.

JOHN C. COOMBS, for himself and
WILLIS C. SILVERTHORN,
Solicitors for Complainants.

John C. Coombs, Equitable Building, Boston, Mass.

Willis C. Silverthorn, Wausau, Wisconsin,
Of Counsel.

10 $2000.00. Sioux City, Iowa, Dec. 10th, 1892.

On June 15th, 1893 (without grace) after date we promise to pay to the order of The Union Loan & Trust Company, two thousand and no/100 dollars, value received, payable at Sioux National Bank, in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND
WAREHOUSE CO.
No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Mr. Deney, Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5000.00 Sioux City, Iowa, Dec. 5th, 1892.

On June 9th, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand and no/100 dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.

No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of First National Bank of Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5000.00 Sioux City, Iowa, Dec. 5th, 1892.

On June 10, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand and no/100 dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired.)

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.

No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of First National Bank of Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$1000.00 Sioux City, Iowa, Jan. 13th, 1893.

On July 27, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, one thousand and no/00 dollars, value received, payment at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.

No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of First National Bank of Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$2500.00. Sioux City, Iowa, Feb. 24, 1893.

On August 28th, 1893 (without grace) after date we promise to pay to the order of the Union Loan and Trust Company twenty-five hundred & no/00 dollars, value received, payable at Sioux National Bank in curent funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.
By A. S. GARRETSON, President.

No.....Due.....

(Indorsed on back) Pay to the order of First National Bank of Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

11 $5000. Sioux City, Feb. 1st, 1893.

On August 30th, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand & no/00 dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.
No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of First National Bank of Montpelier, Vt. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5,000. Sioux City, Iowa, Jan. 13, 1893.

On July 26th, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.,
No. 8031. Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to order of First National Bank of Kewanee, Ill. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5,000. Sioux City, Iowa, Feb. 1st, 1893.

On Aug. 23, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.,

No. 8069. Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of First National Bank of Kewanee, Ill. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$2,500.00. Sioux City, Iowa, Mch. 13, 1893.

On September 21st, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, "five thousand" dollars, value received payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.

No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Andrew Oliver, Kewanee, Ill. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5,000.00. Sioux City, Iowa, Mch. 28th, 1893.

On Sept. 30th, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand & no/100 dollars, value received payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.,

No.....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Geo. Armstrong, Kewanee, Ill. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

12 $5,000. Sioux City, Iowa, Dec. 3, 1892.

On June 6th, 1893 (without grace) after date, we promise to pay to the order of The Union Loan and Trust Company, five thousand no/100 dollars, value received payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York, if desired).

SIOUX CITY TERMINAL R. R. &
WAREHOUSE CO.
No. 7856. Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Garrett County National Bank, Oakland, Md. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5,000. Sioux City, Iowa, Dec. 5th, 1892.

On July 21st, 1893 (without grace) after date we promise to pay to the order of The Union Loan and Trust Company, five thousand dollars, value received, payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. &
WAREHOUSE CO.
No. 7934. Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Naumkeag Natl. Bank, Salem, Mass. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

13 $5,000. Sioux City, Iowa, Feb. 1st, 1893.

On September 2nd, 1893 (without grace) after date, we promise to pay to the order of The Union Loan and Trust Company, five thousand and no/100 dollars, value received payable at Sioux National Bank in current funds, (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL R. R. AND
WAREHOUSE CO.,
No. 8079. Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Central Natl. Bank, Middletown, Conn. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

$5,000. Sioux City, Iowa, Jan. 13, 1893.

On July 24th, 1893 (without grace after date we promise to pay to the order of The Union Loan and Trust Company five thousand no/100 dollars, value received, payable at Sioux National Bank in current funds, (or will pay in exchange on Boston or New York, if desired).

SIOUX CITY TERMINAL R. R. AND WAREHOUSE CO.

No....Due..... By A. S. GARRETSON, President.

(Indorsed on back) Pay to the order of Third Natl. Bank, St. Louis, Mo. Protest Waived. The Union Loan & Trust Co. E. R. Smith, Sec'y & Treas.

14 EXHIBIT.

This indenture, made on this 24th day of April A. D. 1893, by and between the Sioux City Terminal R. R. & Warehouse Co., of Sioux City, Iowa, a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, with its principal place of business at Sioux City, Woodbury Co., Iowa, party of the first part, and the Union Loan & Trust Co., a corporation created and existing under the laws of the State of Iowa, with its principal place of business at Sioux City, Woodbury County Iowa, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of seven hundred and fifty thousand (750,000) dollars, does by these presents grant, bargain, sell, and convey, unto the party of the second part, its successors and assigns, the following described real estate, lying and being situated in the County of Woodbury, State of Iowa, to wit:

All of block twenty-six (26); all of block twenty-seven (27); all of block twenty-eight (28); all of block twenty-nine (29); all of block thirty (30); all of block forty-four (44); lots 7 to 16 inclusive in block thirty-one (31) all in Central Sioux City; the east half of block thirteen (13) all of block fifteen (15) lots ten (10) eleven (11) and twelve (12) and the west third of lots two (2) and three (3) in block seventeen (17) all in Middle Sioux City; lots one and two (1 & 2) in block twenty-five (25) all of block twenty-six (26) lots two, three, four, five, six, ten, eleven, and twelve (2, 3, 4, 5, 6, 10, 11, 12,) in block twenty-seven (27) lots one, two, three, four, five, six, eight, nine, ten, eleven and twelve (1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12) in block twenty-eight (28); lots eight and nine (8 & 9) in block twenty-nine (29) all in Sioux City East Add.

Together with all real estate now owned by said party of the first part, and together with all buildings and improvements thereon or that may be hereafter erected thereon, and all railway lines, side tracks, yards, passenger and freight depots, warehouses, storage houses, elevators and other terminal facilities now thereon, or that may hereafter be erected thereon; also, all rights, privileges, franchises, rights of way of every kind or nature whatsoever, held by this Company or that may hereafter be acquired by it, including all rights and franchises acquired by it under and by virtue of any ordinances or contracts held by it, also all rights in and to any leases now held by said company, or that may hereafter be acquired by this company within the corporate limits of Sioux City, Iowa. The intention being hereby to grant, convey, bargain or sell unto the party of the second part all real estate and personal property, franchises, rights of way, privileges, rights or leases, buildings, improvements, depots, elevators, warehouses, tracks, and each and every kind of property now owned or hereafter acquired by said party of the first part.

To have and to hold the premises above described with all the appurtenances thereunto belonging unto the said party of the second part, its successors and assigns forever.

And the said party of the first part hereby covenants that the said premises are free from all encumbrances, excepting a deed of Trust made on the first day of January A. D. 1890 by the said party of the first part to the Trust Company of North America of Philadelphia, to secure the sum of one million two hundred and fifty thousand (1,250,000) dollars of bonds, and the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assigns, against all persons whomsoever lawfully claiming the same, subject to the lien of the said prior deed of trust.

Provided always, and these presents are upon this express condition, that if the said Sioux City Terminal R. R. & Warehouse Co. shall pay or cause to be paid to the said Union Loan & Trust Co., its successors or assigns, the sum of seven hundred and fifty thousand (750,000) dollars, on the
15 24th day of April A. D. 1898, with interest thereon at six per cent payable annually, according to the tenor and effect of the one hundred and ninety (190) promissory notes of the said Sioux City Terminal R. R. & Warehouse Co. to the said Union Loan & Trust Co., of even date herewith, fifty of which said promissory notes are of the sum of one thousand (1,000) dollars each, and one hundred and forty (140) of which promissory notes are of the sum of five thousand (5,000)

dollars each, then these presents to be void otherwise to remain in full force.

It is further agreed, that if default shall be made in the payment of said sums of money, or any part thereof, principal or interest or if the taxes assessed upon the above described real estate and property shall remain unpaid for the space of three months after the same are due and payable, which taxes may be paid by the party of the second part, then the whole indebtedness secured hereby shall become due, and the said party of the second part, its successors or assigns may proceed by foreclosure or in any other lawful mode to make the amounts of said notes, together with all interests and costs, and all taxes or assessments accrued or paid by the said party of the second part upon the said real estate and property together with interest at the rate of six per cent per annum on all taxes and assessments so paid by the said party of the second part, together with a reasonable fee for plaintiff's attorney, out of the aforesaid real estate and property.

It is further agreed, that this mortgage deed is made for the equal pro rata benefit and security of all and any person or persons, or bodies corporate who may be or become the holders of said notes secured by this mortgage or such of them as shall be outstanding, without preference, priority, or distinction as to the lien or otherwise of any over others, so that each and all of said notes issued under said mortgage and secured thereby, shall have the same right, privilege and lien as security under said mortgage and shall all be equally secured.

In witness whereof, in pursuance of the express authority given by the stockholders and directors of the said Sioux City Terminal R. R. & Warehouse Co., the said party of the first part has caused these presents to be executed in its behalf by its President and Secretary with its corporate seal hereto affixed on this 24th day of April A. D. 1893.

[Seal] SIOUX CITY TERMINAL R. R & WAREHOUSE CO.
By A. S. GARRETSON, President.

Attest D. T. HEDGES, Secretary.

State of Iowa,
Woodbury County—ss.

On this 24th day of April A. D. 1893, before me, C. L. Wright, a Notary Public in and for said County, personally came A. S. Garretson and D. T. Hedges, President and Secretary respectively, of the said Sioux City Terminal R. R. & Warehouse Co., personally to me known to be the identical persons whose names are affixed to the foregoing instrument and personally to me known to be the officers of said grantor, and they severally acknowledged the execution of the foregoing mortgage to be their voluntary act and deed, and the voluntary act and deed of the said Sioux City Terminal R. R. & Warehouse Co., by them as such officers thereunto duly authorized and appointed.

Witness my hand and Notarial Seal the day and year first above written.

[Seal] C. L. WRIGHT,
Notary Public of Iowa in & for County of Woodbury.

16 Indorsed: 138. Equity. In the Circuit Court of the U. S. In and for the Northern District of Iowa, Western Division thereof. First National Bank of Montpelier, Vt.; The First National Bank of Kewanee, Ill.; Garret Co. Bank of Oakland, Maryland; Naumkeag Nat'l Bank of Salem, Mass.; Central Nat'l Bank of Middletown, Conn.; 3rd Nat'l Bank of St. Louis, Mo., Plaintiffs, vs. Sioux City Terminal R. R. & Warehouse Company; Union Loan & Trust Co.; and E. H. Hubbard, Assignee of the Union Loan & Trust Co., and Warwick Hough and S. J. Beals, Receivers of the Sioux City & Northern Railroad Co., as their capacity and interest may appear, Defendants. Filed October 10, 1893. A. J. VanDuzee, Clerk, by J. H. Bolton, Deputy. Bill of Complaint in Equity.

17 And afterwards to wit on the 18th day of December 1893 there was filed in the office of the Clerk of said Court in said Cause, a Petition of Intervention of the Trust Company of North America, which Petition is in the words and figures following, to wit:

In the Circuit Court of the United States in & for the Northern District of Iowa. Western Division.

PETITION OF INTERVENTION OF THE TRUST COMPANY OF NORTH AMERICA.

First National Bank of Montpelier, Vt., First National Bank of Kewanee, Illinois, Garrett County Bank of Oakland, Maryland, Naumkeag National Bank of Salem, Mass., Central National Bank of Middletown, Conn., Third National Bank of St. Louis, Missouri, Plaintiffs

vs.

Sioux City Terminal R. R. & Warehouse Company, Union Loan and Trust Company, and E. H. Hubbard, Assignee of the Union Loan & Trust Company, and Warwick Hough and S. J. Beals, Receivers of the Sioux City and Northern R. R. Company as their capacity and interest may appear, Defendants.

To the Honorable Judges of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division thereof.

Your Petitioner, the Trust Company of North America, a corporation created under and by virtue of the laws of the State of Pennsylvania, and a resident of Philadelphia, in said State, prays permission to intervene and become a party plaintiff in the above entitled cause as against both the plaintiffs and defendants named in said cause, and states:

That in said cause the plaintiffs, The First National Bank of Montpelier, Vermont, and others above named have brought their Bill of Complaint against the defendants, The Sioux City Terminal Railroad & Warehouse Company, and others above named, and therein show to the Court that they are the owners of the promissory notes of the Sioux City Terminal Railroad & Warehouse Company, amounting to fifty eight thousand dollars ($58,000.00) and that said notes are a part of a series of notes amounting to seven hundred and eighteen thousand dollars ($718,00.00); that all of said paper was negotiated through The Union Loan & Trust Company and bore its indorsement, and that as collateral security for said notes the said Sioux City Terminal Railroad & Warehouse Company had executed and deposited with said Union Loan & Trust Company its certain second mortgage upon all of its terminal grounds, depots, ware-houses, tracks, and sidings, at Sioux City, the said mortgage being subject to a prior mortgage of one million two hundred and fifty thousand dollars ($1,250,000.00) previously executed and recorded; that said Union Loan & Trust Company had assigned for the benefit of its

creditors, and was insolvent, and that its assignee, the Hon. E. H. Hubbard, had failed and refused to bring an action to foreclose the said second mortgage and that the said Sioux City Terminal Railroad and Warehouse Company was insolvent; that its property had been leased for a period of one hundred (100) years to the Sioux City & Northern Railroad Company at an agreed rental of ninety thousand dollars ($90,000.00) a year and that said rental was in default; that the taxes on the property was unpaid; that numerous
18 mechanics' liens had been filed on the buildings of the said Terminal Company, and praying a foreclosure of the said second mortgage and the appointment of a receiver to take charge of the property of the said Sioux City Terminal Railroad & Warehouse Company, and thereupon an order was entered by the Court appointing the Hon. Warwick Hough receiver of the said Sioux City Terminal Railroad & Warehouse Company, and authorizing and empowering the said receiver to take charge and possession of all property of the said Sioux City Terminal Railroad & Warehouse Company, and receive and collect all rents and revenues therefrom.

And thereupon leave being granted your orator shows to the Court that prior to all transactions mentioned in plaintiff's Bill of Complaint, and on the 1st day of January 1890, the said Sioux City Terminal Railroad & Warehouse Company made, executed, and delivered to your Petitioner, The Trust Company of North America, its certain Trust Deed or mortgage upon all of its property in Sioux City, Iowa, consisting of terminal grounds, railway lines, side-tracks, yards, passenger and freight depots, ware-houses, storage-houses, elevators, and other terminal facilities. A copy of said trust deed being hereto attached marked exhibit "No. 1" and made a part of this petition. And that said deed of trust so made was executed and delivered to secure the authorized issue of one million two hundred and fifty thousand dollars ($1,250,000) of bonds of the said Sioux City Terminal Railroad & Warehouse Company and in accordance with the provisions of said trust deed, your petitioner, The Trust Company of North America, certified all of said bonds and delivered the same to the various persons and purchasers who were entitled thereto and that said bonds are now outstanding and unpaid.

That prior to the execution of said trust deed, and on the 14th day of December 1889, the said Sioux City Terminal Railroad & Warehouse Company had made and entered into a certain contract of lease with the Sioux City & Northern Railroad Company whereby the said Terminal Company leased

and rented to the said Railroad Company all of its terminal property more fully described and set out in the said trust deed hereto annexed, for a period of one hundred (100) years, from said date, at an annual rental of ninety thousand dollars ($90,000.00) a year. A copy of said lease being hereto attached marked Exhibit "No. 2" and made a part of this petition. And by the terms of said lease, it is provided that the said Sioux City & Northern Railroad Company shall pay to the Trust Company of North America, seventy-five thousand dollars ($75,000.00) of said rental directly to be applied as interest on the bonds issued by said Terminal Company, and secured by mortgage herein set forth as exhibit "No. 1" and in addition to said seventy-five thousand dollars ($75,000.00) such further sum as may be necessary to pay the expenses of the trusteeship of your petitioner, and it is therein further provided that the said Railroad Company shall have full right and authority to sub-let any portion of said terminal property and collect and receive the sub-rentals therefor so long as there is no default in the payment of the interest or principal upon the bonds given by the said Terminal Company, and secured by mortgage to the Trust Company of North America, but it is further provided in said lease, that if there should be any default in the payment of the rentals therein provided, or in case there shall be any default in the payment of the interest on the bonds secured by the mortgage to the Trust Company of North America, then said rentals so due, or to become due, from such corporation or persons sub-leasing any portion of said real estate, terminal grounds, terminal facilities, or tracks, or buildings, shall be payable to the
19 said trustee named in said mortgage given by said Terminal Company, and the same shall be held and applied by the said trustee to the payment of the interest upon said bonds aforesaid. And the said trustee shall have all the remedies given by law, or by virtue of said sub-leases to enforce the collection of the said rentals, and it is further provided in said lease, that all sub-leases or contracts for the use of any of said premises, or any parts thereof, as may be made by the said railroad company shall inure to the benefit of the said trustee under the mortgage aforesaid. And it is also provided in said trust deed with reference to said lease as follows:

"And whereas, by the terms and stipulations of said indenture of lease of December 14th, 1889, The Sioux City and Northern Railroad Company the lessee thereunder, has expressly covenanted and agreed to pay an annual rental of ninety thousand dollars payable quarterly and to pay of said rental seventy-five thousand dollars thereof, directly to

the Trust Company of North America, trustee herein, to apply on the interest of the bonds issued by the said Sioux City Terminal Railroad and Warehouse Company and secured by mortgage given to the said The Trust Company of North America, this present mortgage being thereby designated and intended and such other portion of ninety thousand dollars as shall be necessary to pay the expenses of the trusteeship of the said trustee, it is hereby further covenanted and agreed that the trustees shall be clothed with all the rights powers authority and discretion which, by the terms of the said indenture of lease are vested in the party of the first part for the enforcement of the payment of the said seventy-five thousand dollars in each and every year and of such further sums as shall be necessary to pay the expenses of the trusteeship of the said trustee, and shall also be entitled to all the remedies which are reserved or granted to the lessors by or under said indenture of lease for the recovery of the moneys agreed thereby to be paid, and for the enforcement in every respect of the rights of the lessor or party of the first part, and the party of the first part, in case of default herein, shall, whenever required, assign and transfer such indenture of lease to the said trustee to be held for the uses and trusts in this indenture set forth. And in case of such default the said trustee shall be also entitled to all rents, due or to become due, from any tenants, or persons or corporation occupying or using any of the said property or franchises under any sublease or contract from said Sioux City & Northern Railroad Company, to be applied in the payment of the principal or interest of the said bonds, and said trustee or purchasers under said mortgage shall be entitled to all the remedies to collect said rent, given by law or by said sub-leases."

That said lease has never been modified, abrogated or annulled and is still in force, and is a part of the security pledged and transferred to your petitioner, The Trust Company of North America for the equal benefit of the bondholders under the deed of trust to it made and delivered.

That under the terms of said lease and trust deed, all of the sub-rentals and profits of the said Terminal property can be received and collected by the Sioux City & Northern Railroad Company up to the time of its default in the payment of the rentals, under said lease and after such default the said sub-rentals, incomes, and profits, from the said property can only be collected by your petitioner, The Trust Company of North America, and no contingency can arise during the life and existence of said lease and trust deed whereby the said Sioux City Terminal Railroad and Ware-

house Company is entitled to or can collect any portion of the said sub-rentals incomes or profits. That the said Sioux City and Northern Railroad Company has failed and neglected to pay the quarterly payment of rent due under said lease on the 14th day of September 1893, and such default has continued up to this time; and further your petitioner under the terms and provisions of said lease and trust deed has become entitled to receive and collect all the sub-rentals, incomes, and profits, from all of the said Terminal property and apply the same to the payment of interest upon the bonds secured by said trust deed, without modifying or annulling said lease, but keeping and reserving all rights under said lease and the security thereby afforded and accounting only for the sub-rentals and incomes received after deducting the reasonable costs and expenses of collection; that in violation of the provisions of said trust deed, the said Sioux City Terminal Railroad & Warehouse Company have failed and neglected to pay the taxes due upon said property and a large part of the same are now due and delinquent, the amount now delinquent thereon being about seven thousand dollars ($7,000.00); that a portion of the property embraced in said trust deed has been sold for taxes a portion thereof in the year 1891 and another portion in the year 1892; that a large number of liens have been filed by mechanics and others upon the buildings embraced in said trust deed, and your petitioner will be put to costs and expense in defending against the same, and that said Sioux City Terminal Railroad & Warehouse Company is now insolvent.

That the Sioux City and Northern Railroad Company is now in the hands of receivers on the application of the first mortgage bondholders and the probability is that the said railroad will not only fail to pay the next installment of rentals on said lease, but will also default on the interest on its own first mortgage bonds which will be due the 1st day of January 1894. That the receivers of the said Sioux City & Northern Railroad Company are not attempting to collect any of the sub-rentals or incomes from the Terminal Property.

And your petitioner further shows to the Court that the Hon. Warwick Hough who has been appointed receiver of the Terminal property in the above entitled cause, claims that under the terms of his appointment as such receiver he is entitled to receive and collect the sub-rentals and incomes from the Terminal property, and is attempting to proceed with the collection thereof, which your petitioner alleges is in violation of the express terms and provisions of the lease and trust

deed hereinbefore referred to, whereby the said rentals and incomes were pledged to your petitioner, as trustee, and whereby authority was granted and conferred upon your petitioner to collect the said sub-rentals and incomes and apply the same to the reduction of the interest on the bonds, which said trust deed secured.

Wherefore your petitioner prays that the order appointing the Hon. Warwick Hough receiver be so modified as to relieve him from the duty and responsibility of collecting the sub-rentals and incomes from the Terminal property to the end that the same may be collected by your petitioner for the purposes mentioned.

THE TRUST CO. OF NORTH AMERICA,
Petitioner.
By JOY, CALL & JOY,
Its Solicitors.

A. F. CALL, of Counsel.

State of Iowa,
Woodbury County—ss.

I, A. F. Call, being duly sworn on oath say that I am one of the attorneys for petitioner, in the above entitled cause; that I know the statements and allegations set forth in the foregoing petition of intervention, and that they are true.

A. F. CALL.

21 Subscribed and sworn to before me by A. F. Call, this 27th day of November 1893.

[Seal] CHAS. A. COHENOUR, Notary Public.

* * * * * * * *

("Exhibits '1' and '2' are the same respectively as Exhibits 'A' and 'Aa', to the evidence of the witness John Cadwalader, found on page 143 of the transcript and page 140 of printed record".)

35 Indorsed: No. 138. In the Circuit Court of the United States Northern District of Iowa, Western Division; First National Bank of Montpelier, Vt., et al., vs. Sioux City Terminal R. R. & Warehouse Company et al. Petition of Intervention of the Trust Company of North America. Filed Dec. 18th, 1893. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

36 And afterwards, to wit, on the 17th day of April, A. D. 1894, there was filed in the office of the Clerk of said Court, in cause No. 142 Equity, a Bill of Complaint of the Trust

Company of North America, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa. Western Division.

To the Judges of the Circuit Court of the United States for the Northern District of Iowa, Western Division.

The Trust Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, with its principal place of business at Philadelphia, brings this its bill of complaint against the Sioux City Terminal Railroad & Warehouse Company, a corporation organized and existing under the laws of the State of Iowa, and a citizen of said State, Warwick Hough, Receiver of the Sioux City Terminal Railroad and Warehouse Company, a citizen and resident of the State of Missouri, the Union Loan & Trust Company, a corporation organized and existing under the laws of the State of Iowa, and a citizen of said State, E. H. Hubbard, assignee of the Union Loan & Trust Company, a citizen and resident of the State of Iowa, The Sioux City & Northern Railroad Company, a corporation organized and existing under the laws of the State of Iowa, and a citizen of the State of Iowa, Warwick Hough, one of the receivers of the Sioux City & Northen Railroad Company, and a citizen and a resident of the State of Missouri, Samuel J. Beals, one of the receivers of the Sioux City & Northern Railroad Company and a citizen and resident of the State of Iowa, the Manhattan Trust Company, a corporation organized and existing under the laws of the State of New York, and a citizen and resident of the State of New York; the First National Bank of Montpelier, Vermont, a corporation created under and by virtue of the laws of the United States and a citizen and resident of the State of Vermont; the First National Bank of Kewanee, a corporation created under and by virtue of the laws of the United States, and a citizen and resident of the State of Illinois; The Garrett County Bank, a corporation created under and by virtue of the laws of the United States, and a citizen and resident of the State of Maryland; The Naumkeag National Bank, a corporation created under and by virtue of the laws of the United States and a citizen and resident of the State of Massachusetts; the Central National Bank, a corporation created under and by virtue of the laws of the United States and a resident and citizen of the State of Connecticut; the Third National Bank of St. Louis, a corporation created under and by virtue of the laws of the United States, a resident and citizen of the State of Missouri; E. H. Hubbard, trustee, a citizen and resident of the State of Iowa;

Charles E. Faeth, a citizen and resident of the State of Iowa, Beach & Weld, a co-partnership consisting of S. J. Beach, a citizen and resident of the State of Iowa, and Charles L. Weld, a citizen and resident of the State of Iowa, R. & J. Barrett, a co-partnership consisting of Robert Barrett, a citizen and resident of the State of Iowa, and James Barrett, a citizen and resident of the State of Iowa, Coughlin and Sullivan, a co-partnership consisting of Jeremiah J. Coughlin and Joseph H. Sullivan, citizens and residents of the State of Iowa, J. H. Queal & Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa, and transacting business at Sioux City; E. C. Wakefield, a citizen and resident of the State of Iowa; Sioux City Electrical Supply Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of said State, E. A. Conway, a citizen and resident of the State of Iowa, Carr,
37 Ryder & Engler Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of said State; W. H. Burns, a citizen and resident of the State of Iowa; Hornick, Hess & Moore, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa, Hopper & McNiel, a co-partnership consisting of Charles T. Hopper, a citizen and resident of the State of Iowa and Henry C. McNiel, a citizen and resident of the State of Iowa; Sioux City Brick & Tile Works, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa; Grant Breese & Company, a co-partnership organized and existing under the laws of the State of Wisconsin, a citizen and resident of the State of Wisconsin; Gillette-Herzog Manufacturing Company, a corporation organized and existing under the laws of the State of Minnesota, a citizen and resident of the State of Minnesota; John G. Olson, a citizen and resident of the State of Iowa; James D. Spaulding, a citizen and resident of the State of Iowa; Hermann & Savage, a co-partnership consisting of Adolph Hermann, a citizen and resident of the State of Iowa, and William H. Savage, a citizen and resident of the State of Iowa; Tom Ness, a citizen and resident of the State of Iowa; Fletcher & Hutchins Company, a corporation [organization] and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa; John Sutton, a citizen and resident of the State of Iowa; Fred S. Martin, a citizen and resident of the State of Minnesota; Webb Brothers, a co-partnership consisting of James D. Webb, a citizen and resident of the State of Iowa, and Walter I. Webb, a citizen and resident of the State of Iowa; A. Eckert, Ed. Moe, Peter Lorvig, Gust. Nelson, G. Davelarr, C. A. Nokes, F. Russel, C. F. Nelson, C. Peterson, H. Wolf, D. Wolf, G. Ingerbregtson, Osmond Olson, D. Payette,

Louis Hanson, T. R. Hockinsmith, C. W. Lidster, George Legvold, C. Siedel, Frank Draper, Paul Ekle, John Furre, Joseph Josselyn, Oscar Lindblom, Ed. Marion, J. Nettum, John Ohlund, John Volz, L. Kaarkus, Louis Soiseth, H. Wood, Henry Soiseth, George Robinson, Frank Wilson, S. Sorrenson, E. Stran, F. Dewey, Martin Eide, Clarence Holt, M. Senfelder, each and all of whom are citizens and residents of the State of Iowa, Van Brunt & Howe, and J. A. L. Waddell, a co-partnership, a citizen and resident of the State of Missouri, transacting business at Kansas City in said State; the First National Bank of Shenandoah, Pennsylvania, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Pennsylvania, the Lock Haven Trust & Safe Deposit Company, a corporation organized and existing under the laws of the State of Pennsylvania, a citizen and resident of the State of Pennsylvania; Bank of Lansing, a corporation organized and existing under the laws of the State of Michigan, a citizen and resident of the State of Michigan; T. P. Murphy, a citizen and resident of the State of Iowa; Dye Brothers, a co-partnership, a citizen and resident of the State of Pennsylvania, and transacting business as such in said State; First National Bank of Erie, Pennsylvania, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Pennsylvania; First National Bank of Sharon, Pennsylvania, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Pennsylvania; Girard National Bank of Philadelphia, Pennsylvania, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Pennsylvania; The First National Bank of Orwigsburg, Pennsylvania, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Pennsylvania; The Kenduskeag National Bank, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Maine; National Union Bank
38 of Maryland, at Baltimore, Maryland, a corporation organized and existing under the laws of the United States, a citizen and resident of the State of Maryland, Tolerton & Stetson Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa; C. F. Hoyt, a citizen and resident of the State of Iowa; Martha Hoyt, a citizen and resident of the State of Iowa; Fidelity Loan & Trust Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa; and the Credits Commutation Company, a corporation organized and existing under the laws of the State of Iowa, a citizen and resident of the State of Iowa.

That this suit is brought to foreclose a mortgage or deed of trust to enforce the lien thereof upon and against certain real estate, lying and being in the County of Woodbury, and State of Iowa; and that the amount in controversy exclusive of interest and costs exceeds the sum of two thousand dollars ($2,000), and thereupon your orator complains and says:

That on the fourteenth day of December in the year 1889, the defendant, the Sioux City Terminal Railroad & Warehouse Company, was the owner of certain real estate lying and being in the County of Woodbury, and State of Iowa, more fully and particularly hereinafter described, and was also the owner of certain franchises, under the city of Sioux City, permitting the use of certain streets and alleys for the use of railroad and side tracks, and other terminal facilities and for the purpose of defraying the expense of completing its lines of railroad and the purchase of the necessary ground for its lines of railway, side tracks, passenger and freight depots, yards, warehouses, storage houses, elevators and other terminal facilities within the corporate limits of the city of Sioux City, Iowa, and of building and constructing such lines of railway, side tracks, passenger and freight depots, yards, warehouses, elevators, and other terminal facilities and for the lawful purposes of the company, and being by law so authorized to do, proposed to make and issue its certain negotiable bonds and obligations to the extent of one million two hundred fifty thousand dollars ($1,250,000) and thereby become indebted to the various persons and corporations who might become the holders of said bonds, did on said day by a vote of its stockholders and directors, authorize its officers to make and issue its certain bonds and obligations to the extent and number of one thousand two hundred fifty (1,250) of the sum of one thousand dollars ($1,000) each numbered from one (1) to one thousand two hundred and fifty (1,250) inclusive, in the general form as shown by Exhibit "A" hereto attached and made a part of this bill of complaint, payable at the office of the Trust Company of North America, in Philadelphia, Pennsylvania, with interest at the rate of six (6) per cent., payable semi-annually, as evidenced by coupons attached to such bonds; and to secure the payment of the same by executing and delivering to your orator a deed of trust on all of its property, both real and personal, including all right, franchises and leases which the company then owned, or might thereafter acquire;

That pursuant to the authority thus conferred, the president and secretary of the said Sioux City Terminal Railroad & Warehouse Company did, on the first day of January, 1890, execute and deliver to your orator its certain mortgage or deed of trust whereby it granted, bargained sold, conveyed and confirmed to your orator and to its successors in trust the following lands

and tenements, rights, franchises and leases, railways, side tracks, and other terminal facilities, and also all other property, rights and hereditaments of every kind and nature whatsoever which might thereafter be acquired by said Sioux City Terminal Railroad & Warehouse Company, which mortgage or deed of trust is hereto annexed marked Exhibit "B" and made a
39 part of this bill of complaint, the property therein embraced and subsequently acquired by the said Sioux City Terminal Railroad & Warehouse Company being described as follows, to wit: All of block twenty-six (26), and all of block twenty-seven (27), all of block twenty-eight (28), all of block twenty-nine (29), all of block thirty (30), all of block thirty-one (31), except lots one (1), two (2), three (3), four (4), five (5), and six (6), and all of block forty-four (44), in Central Sioux City; also the east half (E. ½) of block thirteen (13), all of block fifteen (15), lots ten (10), eleven (11), and twelve (12), and the west third (W. ⅓) of lots two (2) and three (3), in block seventeen (17), Middle Sioux City; lots one (1), and two (2), in block twenty-five (25), all of block twenty-six (26), lots two (2) and three (3), four (4), five (5) and six (6), ten (10), eleven (11), and twelve (12), in block twenty-seven (27), lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and twelve (12), in block twenty-eight (28), lots eight (8) and nine (9), in block twenty-nine (29), Sioux City, East Addition; together with all buildings and improvements thereon, and all railway lines, side-tracks, yards, passenger and freight depots, warehouses, storage houses, elevators, and other terminal facilities now or hereafter erected thereon; also all rights, privileges, franchises, and leases of every kind and nature whatsoever, now held by the company or that may hereafter be acquired by it, including the rights and franchises, and also the indenture of lease, dated the fourteenth day of December, 1889, between the Sioux City Terminal Railroad & Warehouse Company and the Sioux City & Northern Railroad Company and all right, title and interest of the said Sioux City Terminal Railroad & Warehouse Company, in, to and under the lease of the Sioux City & Northern Railroad Company thereof; also all property, rights and hereditaments of every kind and nature whatsoever, that may hereafter be acquired by this company within the corporate limits of Sioux City, Iowa; also lots one (1), two (2), three (3), four (4), five (5), and six (6) in block thirty-one (31), in Central Sioux City; lot eighteen (18), in block fifty-three (53), in Central Sioux City; lots one (1), seven (7), eight (8), and nine (9), in block twenty-seven (27), Sioux City East Addition; lot seven (7), in block twenty-eight (28), Sioux City East Addition; lots six (6), and seven (7), in block twenty-nine (29), Sioux City East Addition; the North half (N. ½) and twenty-eight (28) feet off the south end of lots four (4) and five (5) in block twenty-nine (29),

Sioux City East Addition; lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24), in block forty-two (42), lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), and twenty-six (26), in block forty-one (41), lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24), in block forty (40), except railroad right of way of thirty (30) feet across block forty (40), all in Central Sioux City; that part of lots one (1), two (2), and three (3) in block fourteen (14), Middle Sioux City, lying between a line drawn parallel with and on the easterly side of the track known as the Oat Meal Mill track, and fifteen (15) feet distant from the center line thereof, and a line drawn parallel with and on the westerly side of the track known as the Union Stock Yards track and fifteen (15) feet distant from the center line thereof; also all that part of lots four (4) and five (5) in block one (1), Middle Sioux City lying on the easterly side of a line drawn parallel with and fifteen (15) feet distant from the center line of the track known as the Oat Meal Mill track; all that portion of the middle one-third of lots one (1), two (2), and three (3) in block seventeen (17), in Middle Sioux City, lying northwesterly of a curved line drawn with a radius of nine hundred five (905) feet and passing through the southwest corner of lot one (1), in block twenty-seven (27), and the southwest corner of lot seventeen (17), in said Middle Sioux City; also all that certain piece or parcel of ground in Central Sioux City, known and platted as private park, and bounded and described as follows: Bounded on the north by the south line of First street, on the east by the west line of Stuben street, on the south by the north line of Floyd City, and on the west by the east line of Middle Sioux City. Also all buildings, improvements and betterments thereon, including railway tracks, sidings, depots, warehouses, elevators, and also including all rights and franchises, and tracks located in the public streets or alleys adjacent to said property and belonging to the said Sioux City Terminal Railroad & Warehouse Company, including one main line of railway track extending from Jackson street to Howard street through the alley of blocks sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) and twenty-one (21) of Middle Sioux City, and block twenty-five (25), Sioux City East Addition; and also one main line of railway track along Second street from Jackson street eastward to Clark street; and also one side track known as the Oat Meal Mill track, diverging from the main track on Second street, running in a southwesterly direction to the Oat Meal Mill, which is located on Clark street, between First street and Grand street, and also a one-fifth interest in, with

the right to use, the side track, known as the Stock Yards track, diverging from the main track on Second street at Howard street, thence in a southeasterly direction to First street, and thence in an easterly direction along First street to Prospect street and thence in a southeasterly direction to the stock yards, and also including all leases belonging to the said Sioux City Terminal Railroad & Warehouse Company, including the lease of all the said Terminal grounds to the Sioux City & Northern Railroad Company for one hundred (100) years at an annual rental of ninety thousand dollars ($90,000) a year; and also including all the rents and profits and incomes to be derived from said property.

That said conveyance was made to your orator in trust for the equal and ratable security of the holders of the said one thousand two hundred and fifty (1250) bonds of one thousand dollars ($1,000) each, numbered consecutively from one (1) to one thousand two hundred fifty (1250) and that said conveyance was made to your orator upon certain conditions more fully and particularly set out in the copy of said trust deed hereto attached, but generally—

First. That the said Sioux City Terminal Railroad & Warehouse Company agrees to pay all taxes and assessments upon the premises and property granted and to pay all proper charges of the trustee hereunder and all reasonable disbursements incurred by and in the performance of its duties as such trustee, and to keep all its structures and insurable property mortgaged well and sufficiently insured and to deposit the policies of insurance or certificates thereof with the trustee.

Second. That in case default be made in the payment of the interest to accrue on any of said bonds and such interest shall remain unpaid for a period of sixty (60) days after demand or the party of the first part shall allow any taxes or charges to fall in arrears whereby the security of the mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations hereunder or in said bonds contained on its part to be kept and performed, the whole principal of said bonds together with all interest accrued and remaining unpaid thereon shall at the option of the said trustee become due and payable.

Third. That in case any default shall be made in the payment of any interest to secure any of said bonds when
41 the same shall become due and payable, and such interest shall remain unpaid and in arrears for a period of sixty (60) days, or, in case default shall be made

in the payment of the principal of said bonds hereby intended to be secured or any or either of them, when the same shall become due and payable according to the tenor of said bonds, whether by lapse of time or default in the payment of the interest, or if the party of the first part shall suffer or allow any taxes or charges to fall in arrears whereby the security of this mortgage may be impaired, then, in either of these cases, it shall be lawful for the trustee herein to enter into and upon and take possession of the railroad and property hereby conveyed, or mortgaged or intended so to be, and each and every part thereof, and to hold, use, manage, maintain and operate the said railroad and the business of the party of the first part by its own managers, superintendents, receivers or servants to as full an extent as the party of the first part might lawfully do.

Fourth. That the provision in the sixth article of the said trust deed is cumulative to the ordinary remedy by foreclosure in the courts, and the trustee herein may at his discretion whenever entitled so to do by the terms thereof, institute proceedings to foreclose this mortgage, whenever a majority of said bondholders may direct, and in the absence of any such direction, then as such trustee may deem expedient.

Fifth. It is also provided in said trust deed as follows:

And whereas by the terms and stipulations of said indenture of lease of December 14th, 1889, the Sioux City & Northern Railroad Company, the lessee thereunder, has expressly covenanted and agreed to pay an annual rental of ninety thousand dollars ($90,000.00) payable quarterly and to pay of said rental seventy-five thousand dollars ($75,000) thereof directly to the Trust Company of North America, trustee herein, to apply on the interest of the bonds issued by the said Sioux City Terminal Railroad and Warehouse Company and secured by mortgage given to the said the Trust Company of North America, this present mortgage being thereby designated and intended and such other portion of ninety thousand dollars ($90,000) as shall be necessary to pay the expenses of the trusteeship of the said trustee, it is hereby further covenanted and agreed that the trustee shall be clothed with all rights, powers, authority and discretion which by the terms of said indenture of lease are vested in the party of the first part for the enforcement of the payment of the said seventy-five thousand ($75,000) in each and every year and for such further sums as shall be necessary to pay the expenses of trusteeship of said trustee, and shall also be entitled to all the remedies which are reserved or granted to the lessors by or under said indenture of lease for the recovery of moneys

agreed thereby to be paid, and for the enforcement in every respect of the rights of the lessor or party of the first part and the party of the first part, in case of default herein shall whenever required assign and transfer such indenture of lease to the said trustee to be held for the uses and trusts in this indenture set forth. And in case of such default the said trustee shall also be entitled to all rents due or to become due, from any tenants or persons or corporations occupying or using any of the said property or franchises under any sub-lease or contract from said Sioux City & Northern Railroad Company to be applied in the payment of the principal or interest of said bonds, and said trustee or purchasers under said mortgage shall be entitled to all the remedies to collect said rent given by law or by sub-leases.

The said trust deed so executed and delivered to your orator was duly authenticated by the Corporate Seal of the said Sioux City Terminal Railroad and Warehouse Company and was duly recorded with the recorder of deeds of Woodbury County Iowa on the twenty-seventh day of February,
42 1890, in Book 68 of Mortgages, on page 587.

That the said Sioux City Terminal Railroad & Warehouse Company has executed and sold all of its bonds secured by said mortgage or trust deed and in accordance with the provisions thereof to the amount of the par value of one million two hundred fifty thousand dollars ($1,250,000) and all of said bonds were, prior to said sale, duly certified by your orator in pursuance of the terms of said mortgage; and the bonds so executed, certified and sold are now outstanding in the hands of numerous and sundry owners and holders as subsisting obligations of the said mortgagor, with interest at six (6) per cent payable semi-annually on the first days of January and July of each year, respectively as evidenced by interest coupons attached to said bonds; and none of said bonds and none of the interest coupons maturing subsequent to July 1st, 1893, have been paid.

That the interest coupons annexed to said bonds which became due and payable on the first day of January, 1894, were not paid on said date, neither have they since been paid, and the said coupons were at the maturity thereof duly presented for payment at the office of your orator in Philadelphia, Pennsylvania, as therein provided; and the said Sioux City Terminal Railroad & Warehouse Company having failed and neglected to provide the necessary funds for the payment

thereof, the payment of said coupons was, for want of funds, refused; and the said Sioux City Terminal Railroad & Warehouse Company has failed and neglected and refused to pay certain taxes and assessments levied upon and charged against a portion of the property embraced in said mortgage or deed of trust so conveyed to your orator and allowed such taxes to become delinquent and the property so embraced to be held for such taxes and assessments and a portion of the property embraced in said mortgage or deed of trust has been sold for such delinquent taxes and such property still remains unredeemed from such tax sale; the amount of such unpaid taxes is now with interest and penalties about seven thousand dollars ($7,000).

That the said Sioux City Terminal Railroad & Warehouse Company has failed and neglected to keep the property insured for the benefit of your orator as provided in said trust deed, and has failed to deliver the policies of insurance to your orator, as therein provided, or to make the loss, if any, payable to your orator as its interest might appear.

That in pursuance of the terms and conditions contained and expressed in said mortgage or deed of trust and in the bonds which it was given to secure and by reason of the aforesaid defaults, your orator has, in the exercise of its discretion decided to proceed in its own name as trustee for the benefit of said bondholders, to foreclose said mortgage or deed of trust and to sell the property and premises and franchises therein conveyed and described and to enforce the payment of the said bonds;

And with reference to the power of your orator to bid in said property for the benefit of the bondholders and thereafter organize a new company, it is provided: And it is further covenanted and agreed that at any sale of the aforesaid property, railroad, appurtenances and franchises or either or any part thereof, whether made by virtue of any power herein granted, or by any judicial authority, the trustee, if requested so to do in writing by the holders of a majority in interest of all bonds hereby secured and then outstanding, or if to his satisfaction indemnified, may bid for and purchase the same, for and on behalf of all the holders of the bonds hereby secured and then outstanding, in the proportion of the respective interests of such bondholders at a reasonable and proportionate price, if but a portion thereof be sold or if the whole property be sold, at a price not exceeding the total amount of such bonds outstanding with the interest accrued thereon and the ex-
43 pense of such sale. In case of a sale the mortgaged premises or any part thereof in the course of judicial

proceedings as hereinafter provided the purchaser or purchasers at such sale, in making payment of the purchase money and making settlement thereof, after making a cash payment sufficient to cover the costs and expenses of the sale, and all other charges which must be provided for in actual cash, have the right to deliver and pay to the trustee and turn in and use towards the payment of the purchase money, any of the bonds or matured coupons held by him or them to or towards the payment of which the net proceeds of such sale shall be legally applicable—the amount of such bonds or coupons so to be paid in to be determined and fixed by the trustee and at the sum which shall upon proper distribution and accounting for such proceedings be at least equal to the share or portion payable out of such proceeds to such purchaser or purchasers as the holder or holders of such bonds or coupons. And in the event of the purchase of the whole property as aforesaid by said trustee the right and title thereto shall vest in said trustee in trust for the purchasers, and each holder of bonds and coupons shall have an interest in the property so purchased in the proportion that his bonds and coupons bear to the entire issue of bonds and coupons outstanding, and the trustee shall take such lawful measures as may be deemed necessary to organize a new company for the benefit of those for whom the purchase was made, and the trustee so purchasing shall make such conveyance or conveyances of the premises so purchased to such new corporation as may be deemed necessary.

And your orator further alleges that the defendant, the Sioux City Terminal Railroad & Warehouse Company is still the owner of the legal title to said property and that Warwick Hough was appointed receiver of said property by this Court on the application of a portion of the second mortgage bondholders and as such receiver took possession of said property, and your orator is further informed and believes and upon such information and belief alleges that the remaining defendants have some claim of right, title or interest in said property or a portion thereof, adverse to your orators: that is to say, The Union Loan & Trust Company by virtue of an alleged trust deed, securing the series of second mortgage bonds, E. H. Hubbard as Assignee of the said Union Loan & Trust Company under the general assignment laws of Iowa, The Sioux City & Northern Railroad Company under a certain lease for one hundred years, Warwick Hough and Samuel J. Beals as joint receivers of the Sioux City & Northern Railroad Company, Manhattan Trust Company as trustee for the first mortgage bondholders of the Sioux City & Northern Railroad Company and as owner of the stock of the Sioux City Terminal Railroad and Warehouse Company, the First National Bank

of Montpelier, Vermont, The First National Bank of Kewanee, Illinois, The Garrett County Bank, The Naumkeag National Bank, The Central National Bank, The Third National Bank of St. Louis, Missouri, as holders of certain alleged second mortgage bonds, E. H. Hubbard, trustee, under a certain second trust deed securing said alleged second mortgage bonds, Charles E. Faeth, under a lease of a portion of the property, James D. Spaulding, Beach & Weld, R. & J. Barrett, Coughlin & Sullivan, J. H. Queal & Company, E. C. Wakefield, Sioux City Electrical Supply Company, E. A. Conway, Carr, Ryder & Engler Company, W. H. Burns, Hornick, Hess & Moore, Hopper & McNiel, Sioux City Brick & Tile Works, Grant Bresse & Company, Gillette-Herzog Manufacturing Company, John G. Olson, Hermann & Savage, Tom Ness, Fletcher & Hutchins Company, John Sutton, Fred. S. Martin, Webb Brothers, A. Eckert, Ed. Moe, Peter Lorvig, Gust Nelson, G. Davelarr, C. A. Nokes, F. Russel, C. F. Nelson, C. Peterson, H. Wolf, D. Wolf, G. Ingebregtson, Osmond Olson, D. Payettee, Louis Hanson, T. R. Hockinsmith, C. W. Lidster, George
44 Legvold, C. Seidel, Frank Draper, Paul Ekle, John Furre, Joseph Josselyn, Oscar Lindblom, Ed. Marion, J. Nettum, John Ohlund, John Volz, L. Kaarkus, Louis Soiseth, H. Wood, Henry Soiseth, George Robinson, Frank Wilson, S. Sorrenson, E. Stran, F. Dewey, Martin Eide, Clarence Holt, M. Senfelder, Van Brunt & Howe and J. A. L. Waddell, each of whom claims under an alleged mechanics' lien, The First National Bank of Shenandoah under an alleged attachment and judgment, Lock Haven Trust & Safe Deposit Company under an alleged attachment and judgment, Bank of Lansing under an alleged attachment and judgment, T. P. Murphy, Dye Brothers, First National Bank of Erie, First National Bank of Sharon; Girard National Bank of Philadelphia, The First National Bank of Orwigsburg, The Kenduskeag National Bank, The National Union Bank of Maryland, each under an alleged judgment, Tolerton & Stetson Company under an alleged mortgage, C. F. Hoyte and Martha Hoyt, under a claim of title to a portion of the property, The Fidelity Loan & Trust Company under an alleged mortgage, and the Credits Commutation Company as holders of a portion of the alleged second mortgage bonds;

And your orator avers the fact to be that whatever right, title or interest or estate or lien upon such property or any part thereof the defendants above named or each or either of them have or claim to have, whether by virtue of attachments, judgments, mechanics' liens, mortgages or deeds or deed of trust, or of whatever kind or nature, that the same is junior and inferior to the rights and liens of your orator under said mortgage

or deed of trust from the defendant, the Sioux City Terminal Railroad & Warehouse Company.

That the defendant, The Sioux City Terminal Railroad & Warehouse Company, is wholly and entirely insolvent, and in addition to the mortgage given to your orator, it has executed a second mortgage on all its property of seven hundred fifty thousand dollars ($750,000) its property is covered by mechanics' liens to the amount of about fifty thousand dollars ($50,000), the taxes on its property are delinquent and a considerable portion of its property has been sold for such delinquent taxes;

That the property embraced in the trust deed to your orator is insufficient security for the bonds thereby intended to be secured and all of said property could not be sold for a sufficient amount to pay the amount due on said bonds, and the said Sioux City Terminal Railroad & Warehouse Company has no other property, rights or credits and no other means of paying said obligations;

That under the terms of the lease of the said property from the Sioux City Terminal Railroad Company, to the Sioux City & Northern Railroad Company, the sum of seventy-five thousand dollars ($75,000) of said rental was payable to your orator to be applied by it in payment of the interest on said bonds as the interest coupons matured, such rental to be paid in quarterly payments on the fourteenth days of December, March, June and September, and by the terms of the trust deed to your orator, the said lease to the Sioux City & Northern Railroad Company was assigned and hypothecated to your orator as additional security for the payment of the bonds mentioned and described in said trust deed;

And it is provided in said lease and trust deed that in default of payment of the said rental your orator shall be entitled to take possession of all the property embraced therein and collect and receive all rentals, sub-rentals, incomes and profits that may be derived therefrom, without abrogating, cancelling or annulling said lease;

That no rental has been paid by the said Sioux City & Northern Railroad Company since the fourteenth day of June, 1893, but it remained in the continuous use and enjoyment of said property collecting the rents, incomes and profits thereof, until the appointment of a receiver for said property on or
45 about the tenth day of October, 1893, and since that date it has been in use and occupation of a large portion of said property without the payment of any rental.

To the end that your orator may obtain the relief to which it is justly entitled in the premises, it now prays the court to grant it the process of subpoena directed to the Sioux City Terminal Railroad & Warehouse Company, a corporation; Warwick Hough, receiver of the Sioux City Terminal Railroad & Warehouse Company; the Union Loan & Trust Company, a corporation; E. H. Hubbard, assignee of the Union Loan & Trust Company; the Sioux City & Northern Railroad Company, a corporation; Warwick Hough and Samuel J. Beals, joint receivers of the Sioux City & Northern Railroad Company; Manhattan Trust Company, a corporation; First National Bank of Montpelier, Vermont, a corporation; First National Bank of Kewanee, Illinois, a corporation; the Garrett County Bank, a corporation; the Naumkeag National Bank, a corporation; the Central National Bank, a corporation; the Third National Bank of St. Louis, a corporation; E. H. Hubbard, trustee; Charles E. Faeth, James D. Spaulding, S. J. Beach and Charles L. Weld, a co-partnership as Beach & Weld; Robert Barrett and James Barrett, a co-partnership as R. & J. Barrett; Jeremiah J. Coughlin and Joseph H. Sullivan, a co-partnership as Coughlin & Sullivan; J. H. Queal & Company, a corporation; E. C. Wakefield; Sioux City Electrical Supply Company, a corporation; E. A. Conway; Carr, Rider & Engler Company, a corporation; W. H. Burns; Hornick, Hess & Moore, a corporation; Charles T. Hopper and Henry C. McNiel, a co-partnership as Hopper & McNiel; Sioux City Brick & Tile Works, a corporation; Grant Bresse & Company, a corporation; Gillette-Herzog Manufacturing Company, a corporation; John G. Olson; Adolph Hermann and William H. Savage, a co-partnership as Hermann & Savage; Tom Ness; Fletcher & Hutchins Company, a corporation; John Stutton; Fred S. Martin; James D. Webb and Walter I. Webb, a co-partnership as Webb Brothers; A. Eckert; Ed. Moe; Peter Lorvig; Gust. Nelson; G. Davelaar; C. A. Nokes; F. Russell; C. F. Nelson; C. Peterson; H. Wolf; D. Wolf; G. Ingebregtson; Osmond Olson; D. Payette; Louis Hanson; T. R. Hockinsmith; C. W. Lidster; George Legvold; C. Seidel; Frank Draper; Paule Ekle; John Furree; Joseph Josselyn; Oscar Lindblom; Ed Marion; J. Nettum; John Ohlund; John Volz; L. Kaarkus; Louis Soiseth; H. Wood; Henry Soiseth; George Robinson; Frank Wilson; S. Sorrenson; E. Stran; F. Dewey; Martin Eide; Clarence Holt; M. Senfelder; Van Brunt & Howe and J. A. L. Waddell, a co-partnership; the First National Bank of Shenandoah, Pennsylvania, a corporation; the Lock Haven Trust & Safe Deposit Company, a corporation; Bank of Lansing, a corporation; T. P. Murphy; Dye Brothers, a co-partnership; First National Bank of Erie, a corporation; First National Bank of Sharon, a corporation; the Girard National Bank of Philadelphia, a corporation; First National Bank of Orwigsburg,

a corporation; Kenduskeag National Bank, a corporation; National Union Bank of Maryland, a corporation; Tolerton & Stetson Company, a corporation; C. F. Hoyt and Martha Hoyt, Fidelity Loan & Trust Company, a corporation; and the Credits Commutation Company, a corporation, defendants herein named, ordering and commanding each of them to appear herein and answer the several allegations in this your orator's bill contained, but not under oath, the answer of all or each under oath being expressly waived;

And your orator further prays that upon the final hearing hereof, there be found and ascertained the amount of principal and interest due and unpaid on the bonds secured by the mortgage or deed of trust to your orator;

That an account be taken as to the amount due your orator as trustee thereunder and for the moneys paid and expended in the performance of its duties as trustee; that the
46 rights and interests of each of the defendants herein named in and to said property be ascertained, fixed and determined; that upon the coming in of the master's report, the Court will adjudge, order and decree that the defendant, the Sioux City Terminal Railroad Company, shall within a time to be fixed, pay to your orator, in trust for the holders of the bonds secured by the mortgage to your orator, the amount found to be due and unpaid on said bonds; and also to pay to your orator the amount found and ascertained to be due as trustee, including compensation for its services, and all moneys expended, together with reasonable counsel and attorney's fees, to the several parties entitled, the costs of this suit; and that in default thereof, the following described real estate, situate in the County of Woodbury and State of Iowa, to wit:

All of block twenty-six (26), and all of block twenty-seven (27), all of block twenty-eight (28), all of block twenty-nine (29), all of block thirty (30), all of block thirty-one (31), except lots one (1), two (2), three (3), four (4), five (5), six (6), and all of block forty-four (44), in Central Sioux City; also the east half (E. ½) of block thirteen (13), all of block fifteen (15), lots ten (10), eleven (11) and twelve (12), and the west third (W. ⅓) of lots two (2) and three (3) in block seventeen (17), Middle Sioux City; lots one (1) and two (2) in block twenty-five (25), all of block twenty-six (26), lots two (2), three (3), four (4), five (5) and six (6), ten (10), eleven (11) and twelve (12), in block twenty-seven (27), lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12) in block twenty-eight (28), lots eight (8) and nine (9), in block twenty-nine (29), Sioux City East Addition; together with all buildings and improvements thereon, and all railway lines, side-tracks, yards,

passenger and freight depots, warehouses, storage houses, elevators, and other terminal facilities now or hereafter erected thereon; also all rights, privileges, franchises and leases of every kind and nature whatsoever, now held by the company or that may hereafter be acquired by it, including the rights and franchises and also the indenture of lease, dated the fourteenth day of December, 1889, between the Sioux City Terminal Railroad & Warehouse Company and the Sioux City & Northern Railroad Company, and all right title and interest of the said Sioux City Terminal Railroad & Warehouse Company in, to and under the lease of the Sioux City & Northern therefor; also lots one (1), two (2), three (3), four (4), five (5) and six (6), in block thirty-one (31), in Central Sioux City; lot eighteen (18) in block fifty-three (53), in Central Sioux City; lots one (1), seven (7), eight (8) and nine (9), in block twenty-seven (27), Sioux City, East Addition; lot seven (7), in block twenty-eight (28), Sioux City, East Addition; lots six (6) and seven (7), in block twenty-nine (29), Sioux City East Addition; the north half (N. ½) and twenty-eight feet (28) off the south end of lots four (4) and five (5) in block twenty-nine (29), Sioux City, East Addition; lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24), in block forty-two (42); lots seventeen (17), eighteen (18) nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24) and twenty-six (26), in block forty-one (41); lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24), in block forty (40), except railroad right of way of thirty (30) feet across block forty (40), all in Central Sioux City; that part of lots one (1), two (2) and three (3), in block fourteen (14), Middle Sioux City, lying between a line drawn parallel with and on the easterly side of the track known as the Oat Meal Mill track, and fifteen (15) feet distant from the center line thereof and a line drawn parallel with and on the westerly side of the track known as the Union Stock Yards track and fifteen (15) feet distant
47 from the center line thereof; also all that part of lots four (4) and five (5) in block one (1), Middle Sioux City, lying on the easterly side of a line drawn parallel with and fifteen (15) feet distant from the center line of the track known as the Oat Meal Mill track; all that portion of the middle one-third of lots one (1), two (2) and three (3), in block seventeen (17), in Middle Sioux City, lying northwesterly of a curved line drawn with a radius of nine hundred five (905) feet and passing through the southwest corner of lot one (1) in block twenty-seven (27) and the southwest corner of lot seventeen (17) in said Middle Sioux City; also all that certain piece or parcel of ground in Central Sioux City known and platted as Private Park, and

bounded and described as follows: Bounded on the north by the south line of First street; on the east by the west line of Stuben street; on the south by the north line of Floyd City and on the west by the east line of Middle Sioux City; also all buildings, improvements and betterments thereon, including railway tracks, sidings, depots, warehouses, elevators, and also including all rights and franchises and tracks located in the public streets or alleys adjacent to said property and belonging to the said Sioux City Terminal Railroad & Warehouse Company, including one main line of railway track, extending from Jackson street to Howard street, through the alley of blocks sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20) and twenty-one (21) of Middle Sioux City, and block twenty-five (25), Sioux City, East Addition; and also one main line of railway track along Second street from Jackson street eastward to Clark street; and also one side track known as the Oat Meal Mill track, diverging from the main track on Second street, running in a southeasterly direction to the Oat Meal Mill, which is located on Clark street between First street and Grand street; and also a one-fifth interest in, with the right to use, the side track known as the Stock Yards track, diverging from the main track on Second street at Howard street, thence in a southeasterly direction to First street, and thence in an easterly direction along First street to Prospect street, and thence in a southeasterly direction to the Stock Yards; or so much thereof as may be necessary to pay and liquidate the amount found and adjudged to be due and owing on said bonds and coupons; and also the amount found and adjudged to be due your orator as trustee, including moneys expended, compensation for services and counsel and attorneys' fees, and all costs herein, including the cost of such sale; be sold at public auction in the city of Sioux City, County of Woodbury and State of Iowa, after due notice of such sale shall have been published or given as the Court may direct; and that such sale be for cash, or for the bonds and coupons secured by said mortgage.

That the proceeds of such sale be applied in payment, first, of costs and expenses of this suit, and of such sale; second, the amount adjudged to be due your orator as trustee under said mortgage or deed of trust, including compensation and counsel and attorney's fees; third, the amount adjudged to be due your orator as trustee for the bondholders secured by said deed of trust to your orator; fourth, any su-plus then remaining to be paid to whomsoever the Court may decree.

That such sale and conveyance pursuant thereto shall operate to forever bar and foreclose all rights of the defendants and

each and all of them, and every person whomsoever claiming by, through or under said defendants, or either of them, since the commencement of this suit, to all or any portion of said property or any right or interest therein, including the right of redemption.

48 That any purchaser at such sale shall be permitted to surrender bonds and past due coupons secured by the mortgage being foreclosed in payment of the amount bid at the sale, on such basis as may be fixed by the terms of the decree.

That in the meantime, and pending litigation, a receiver be appointed to take charge and possession of the said property and of every part thereof to hold, keep and care for the same and under the directions of the Court to manage and collect the rents, profits and issues arising therefrom; and that complainant have such other and further relief as may to justice and equity appertain.

THE TRUST COMPANY OF NORTH AMERICA.
By JOY, CALL & JOY, its Sols.
WM. L. JOY, of Counsel.

* * * * * * * *

("Exhibits 'A' and 'B' to the foregoing complaint are the same respectively as Exhibits 'A' and 'Aa,' to the evidence of witness John Cadwalader, page 143 of transcript, and page 140 of printed record.")

64 Indorsed: No. 142. Circuit Court of the U. S. Northern District of Ia. The Trust Company of North America, plaintiff, vs Sioux City Terminal Railroad and Warehouse Company, defendants. Bill of Complaint. Filed April 17th, A. D. 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

65 And afterwards, to wit, on the 19th day of June, 1894, there was filed in the office of the Clerk of said Court in said cause, a Demurrer, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa. Western Division.

DEMURRER.

Trust Company of North America, Complainant,
vs.
Sioux City Terminal Railroad & Warehouse Company et al., Defendants.

Now comes the undersigned defendants in this cause, and specially appearing for this purpose and no other, demur each

for himself to the Bill as Amended herein for want of jurisdiction and ask that the same be dismissed for the following reasons:

1. It does not appear from the bill that the parties before the Court are such as to give the court jurisdiction of the same.

2. Because it does appear on the face of said bill that a large number of said defendants, to wit, First National Bank of Shenandoah, Lock Haven Trust & Safe Deposit Company, Dye Bros., First National Bank of Erie, First National Bank of Sharon, Girard National Bank of Philadelphia, First National Bank of Orwigsburg, and other defendants, were at the commencement of this suit and are each and all corporations or partnerships created in and under the laws of, and citizens and residents of, the state of Pennsylvania, being the same state with the plaintiff in this action, and being joint and necessary defendants thereto.

3. It is shown on the face of said bill of complaint that neither the complainant on the one side, nor the defendants on the other, are all citizens of this district in which this suit is brought.

4. It is shown by said bill on its face, that the said principal indebtedness has not yet matured, nor has any contingency happened under which said principal indebtedness could be declared due and payable; and the said principal indebtedness has not so matured as to authorize suit thereon; and the said bonds nowhere provide for maturing the principal indebtedness upon any default.

Wherefore these defendants demand judgment of this Honorable Court whether they shall be compelled to make any further answer to the said bill, or any of the matters and things therein contained, and pray to be dismissed with their reasonable costs in their behalf sustained.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO

E. H. Hubbard, as Assignee Union Loan and Trust Co.; E. H. Hubbard as Trustee; Robert and James Barrett; J. H. Queal & Co.; E. C. Wakefield; Hornick Hess & Moore; Union Loan & Trust Co; James D. Spaulding; Credits Commutation Co.

By SPALDING, TAYLOR & BURGESS,
Their Solicitors.

H. J. TAYLOR,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY J. TAYLOR,
Of Counsel for said Defendants.

66 The affidavit to and other execution of above demurrer is hereby waived.

JOY, CALL & JOY,
Solicitors for Complainant.

Indorsed: In the Circuit Court of the United States for the Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad and Warehouse Company. Demurrer. Filed June 19th, 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

67 And afterwards, to wit, on the 29th day of September, 1894, there was filed in the office of the Clerk of said Court in said cause, an answer of E. H. Hubbard et al., which answer is in the words and figures following, to wit:

In the Circuit Court of the United States Northern District of Iowa, Western Division.

ANSWER.

The Trust Company of North America
vs.
The Sioux City Terminal Railroad and Warehouse Company, et al.

Answer of Elbert H. Hubbard, as assignee of the Union Loan and Trust Company; Elbert H. Hubbard, as trustee; Union Loan and Trust Company; First National Bank of Montpelier, Vermont; First National Bank of Kewanee, Illinois; Garret County Bank of Oakland Maryland; Naumkeag National Bank of Salem, Massachusetts; Central National Bank of Middletown, Connecticut; Third National Bank of St. Louis, Missouri; Kenduskeag National Bank of Bangor, Maine; and the Credits Commutation Company, defendants to the bill of complaint.

These defendants saving and reserving unto themselves benefit of exceptions to all errors and imperfections in said bill contained, for answer to so much thereof as they are advised it is necessary or material for them to answer unto, do hereby aver and allege:

I.

First. That they deny each and every allegation in said bill of complaint contained.

II.

Second. These defendants further allege that said Elbert H. Hubbard, as trustee, for the use and benefit of all those persons, firms or corporations who may own or hold notes of the Sioux City Terminal Railroad and Warehouse Company sold by and through the said Union Loan and Trust Company and by it indorsed and also for the use and benefit of said Elbert H. Hubbard as assignee of said Union Loan and Trust Company, in the amount and sum of ten thousand (10,000) dollars overdraft, is the sole and absolute owner of all property real, personal or mixed, and in said bill of complaint described, free and clear of any prior lien thereon on behalf of or in favor of said Trust Company of North America as trustee, or individually.

III.

Third. These defendants further allege that the said alleged mortgage to the said Trust Company of North America was never authorized by the board of directors or stockholders of the said Sioux City Terminal Railroad and Warehouse Company, and that said alleged officers purporting to execute the same, had no authority so to do; that the amount of bonds purporting to be thereby secured, all sold at one time, were and in amount of said bonds ever since outstanding are far in excess of the capital stock of the said Terminal Company, which fact was known to all the purchasers of said bonds and said complaint; and the said alleged trust deed and bonds issued thereunder were and are wholly invalid and void, and of no force or effect, and constitute no lien upon any of the properties of said Sioux City Terminal Railroad and Warehouse Company.

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IV.

Fourth. These defendants specially deny that the said alleged lien and interest of the said Trust Company of North America in or to any of the properties in said bill of complaint described, is superior and prior to the interest and lien of said Elbert H. Hubbard trustee, or of said Elbert H. Hubbard assignee, or of the said Union Loan and Trust Company, but allege on the contrary that the liens of each of the defendants are superior to the lien, if any, of the said Trust Company of North America, as trustee or individually.

V.

Fifth. These defendants allege that, prior to the making of said alleged mortgage to said complainant, said alleged mortgagor Company had leased all and singular the property men-

tioned and described in said mortgage to the Sioux City and Northern Railroad Company, who were then and theretofore and ever since have been in full possession of the property described in said mortgage, and if the Trust Company of North America took any interest by the said instrument, it was wholly an assignment of rent charges, and of no other interest in said premises.

VI.

Sixth. These defendants further allege that the said Trust Company of North America has also, if it has any lien under its mortgage, other security for its alleged lien, to wit: A right in equity by subrogation or otherwise, to said Sioux City Terminal Railroad and Warehouse Company's landlord's lien upon all the rolling stock and personal property of the said Sioux City and Northern Railroad Company, both for accrued and accruing rent to the end of the lease existing between the said Sioux City and Northern Railroad Company and the said Sioux City Terminal Railroad and Warehouse Company.

These defendants say that substantially all the stock of said Sioux City Terminal Railroad and Warehouse Company was issued by said company for, and directly or indirectly to, the Sioux City and Northern Railroad Company, and was by it transferred to the Manhattan Trust Company, a defendant herein, and who still holds the same, all substantially without any payment or consideration therefor, to said Terminal Company, or as between the parties to said transfer, and with full knowledge by both parties that practically nothing had been paid to said Terminal Company for or on account of said stock, that said Manhattan Trust Company has asserted the rights of ownership of said stock herein and as against the rights and interests of these defendants herein, as these defendants are advised, is liable to pay the full amount of the par value of said stock for the relief of these defendants herein.

And these defendants ask that the rights of the parties in the premises may be determined prior to the determination of said foreclosure proceedings herein.

VII.

Seventh. These defendants allege that the said corporation Warehouse Company was under the control of five persons, namely: called the railroad syndicate being a co-partnership, which syndicate caused said Warehouse Company to make and issue its said promissory notes under an agreement with the said Union Loan and Trust Company, assignor of the said Elbert H. Hubbard assignee, under which agreement said Union Loan and Trust Company undertook to and did

indorse and negotiate said promissory notes of the Warehouse Company, and placed the proceeds thereof to the account of one John Hornick, trustee, a member of said co-partnership, and the said funds were used in the acquisition of the properties of the said Warehouse Company

And it was agreed between said Union Loan and Trust Company and said railroad syndicate that all of the properties and securities should be held, and the said bonds purporting to be secured by the alleged mortgage to the said Trust Company of North America were in fact placed in the actual possession of the said Union Loan and Trust Company as collateral security for its said indorsement and for the said notes so negotiated by it, and which said notes in amount were in excess of the amount of said bonds and the same have by substitution and renewals and by the continuous indorsement of the said Union Loan and Trust Company as aforesaid, remained in large amounts continuously up to the time of the assignment of the said Union Loan and Trust Company for the benefit of the creditors. And the said bonds while so placed with the said Union Loan and Trust Co., as aforesaid, were without its knowledge, authority or consent taken and removed from its possession, and whether any of the same are now outstanding in the hands of bona fida purchasers thereof or not, these defendants are ignorant, and will require proof of the same.

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And these defendants ask that the said Trust Company of North America, if any interest it has in said property under and by virtue of the said alleged trust deed, be held to hold the same in trust for the benefit of said Elbert H. Hubbard assignee and trustee, prior to any claim or interest therein in favor of said Trust Company of North America, or any other holder of said bonds than said Elbert H. Hubbard assignee or E. H. Hubbard trustee, the said bonds having been wrongfully and without authority taken from said Union Loan and Trust Company and delivered to parties unknown to your defendants.

VIII.

Eighth. These defendants deny that said indebtedness or any part of it, even if valid, is due.

These defendants ask that said Bill of Complaint be dismissed.

ELBERT H. HUBBARD,
As Assignee of the Union Loan and Trust Co.
ELBERT H. HUBBARD, As Trustee,
UNION LOAN and TRUST CO.

FIRST NATIONAL BANK OF MONTPELIER, VT.
FIRST NATIONAL BANK OF KEWANEE, ILL.
GARRETT COUNTY BANK, OF OAKLAND, MD.
NAUMKEAG NATIONAL BANK OF SALEM, MASS.
CENTRAL NATIONAL BANK OF MIDDLETOWN, CONN.
THIRD NATIONAL BANK OF ST. LOUIS, MO.
KENDUSKEAG NATIONAL BANK OF BANGOR, ME.
CREDITS COMMUTATION COMPANY.

By JOHN C. COOMBS and
HENRY J. TAYLOR,
Their Solicitors.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Of Counsel.

Indorsed: No. 142. Equity. Circuit Court United States. Trust Co. of North America vs. Sioux City Terminal and Warehouse Company. Answer of E. H. Hubbard et al. Filed Sept. 29, 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

70 And afterwards, to wit, on the 24th day of May, 1895, there was filed in the office of the Clerk of said Court in said cause, an application of several banks to be made parties in the cause, which application is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

APPLICATION TO BE MADE PARTIES.

The Trust Company of North America

vs.

Sioux City Terminal Railroad and Warehouse Company et al.

To the Judges of the Circuit Court of the United States, for the Northern District of Iowa, Western Division:

The First National Bank of Shenandoah, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of the State of Pennsylvania; the Lock Haven Trust and Safe Deposit Company, a corporation organized under the laws of the State of Pennsylvania, and a

citizen and resident of the State of Pennsylvania; the First National Bank of Sharon, Pennsylvania, a corporation of the State of Pennsylvania, and a citizen and resident of the State of Pennsylvania; The Girard National Bank of Philadelphia, Pennsylvania, a corporation of the State of Pennsylvania, and a citizen and resident of the State of Pennsylvania; and the First National Bank of Orwigsburg, Pennsylvania, a corporation of the State of Pennsylvania and a citizen and resident of the State of Pennsylvania; the Second National Bank of Erie, Pennsylvania, a corporation of the State of Pennsylvania and a citizen and resident of the State of Pennsylvania, show to the court that they are interested in the property in controversy, having acquired judgment liens thereon, and therefore ask that they be made parties defendant in said cause in order that their rights and equities may be preserved.

W. G. SEARS,
Solicitor for First National Bank of Shenandoah, Pennsylvania.

SPAULDING, TAYLOR & BURGES,
Solicitors for the Lock Haven Trust and Safe Deposit Co.; First National Bank of Sharon Pennsylvania; Girard National Bank of Philadelphia, Pennsylvania; First National Bank of Orwigsburg, Pennsylvania; Second National Bank of Erie, Pennsylvania.

Indorsed: Original. 142. Eq. Circuit Court of the U. S. Northern District of Iowa, Western Division. The Trust Co. of North America vs. Sioux City Terminal Railroad and Warehouse Company et al. Application to be made parties. Filed May 24th, 1895. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy. Joy, Call & Joy, Solicitors for the Trust Co. of North America.

71 And on the 29th day of September A. D. 1894, there was filed in the office of the Clerk of said Court in said cause, an answer of the Sioux City Terminal Railroad and Warehouse Company, to the bill of complaint of the Trust Company of North America, which answer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa. Western Division.

ANSWER.

Trust Company of North America
vs.
Sioux City Terminal Railroad and Warehouse Company et al.

Answer of the Sioux City Terminal Railroad and Warehouse Company, defendant, to the bill of complaint herein.

This defendant saving and reserving unto itself benefit of exceptions to errors and imperfections in said bill contained, and especially pointing out the many elections, options and controls vested in certain proportions and majorities of the holders of the bonds purporting to be secured by the alleged mortgage in said proceedings sought to be foreclosed, together with the powers of revocation of all proceedings herein therein contained, and calling attention to the express instability thereof as a foundation for their suit, without joinder herein of all said bondholders and the impounding of their alleged negotiable bonds, and also to the insufficiency of the statement in said bill as to the exercise performance or waiver of said options, elections and powers, and asking the same benefit thereof as if objection thereto was taken by way of demurrer to said bill for answer to so much of said bill as this defendant is advised it is necessary or material for it to answer do aver and say:

I.

First. That it denies each and every allegation in said bill of complaint contained.

II.

Second. This defendant states that the entire amount of stock authorized or issued by the said Sioux City Terminal Railroad and Warehouse Company is only one million (1,000,000) dollars in amount, and that the said alleged mortgage set out in plaintiff's bill of complaint was received by said Trust Company of North America, and the alleged bonds secured thereby were received by the holders of said bonds with full knowledge that the said stock was limited to said one million (1,000,000) dollars and that the incurring of an indebtedness so much as that represented by said trust deed was in violation of the statutes of Iowa, made and provided, and ultra vires and void and without authority of law on the part of said stockholders or directors, of the said Sioux City Terminal Railroad and Warehouse Company or the said corporation.

And that said indebtedness so taken by said Trust Company of North America and the bondholders represented by it, was taken for less than its full face with full knowledge of the lack of authority on the part of said corporation to issue so large an amount of its said bonds and especially to issue so large an amount at one time as one indebtedness under one instrument, and therefore said mortgage is null and void, and especially so as said stock was unpaid for to the knowledge of the complainant and the holders of the bonds secured by said trust deed to said complainant.

III.

72 Third. This defendant further answering says that no such mortgage as that set out in said bill of complaint and purporting to be signed and executed by alleged officers of this defendant was ever authorized by this defendant, its stockholders or directors.

That the only mortgage [every] authorized by this defendant for the security of the bonds mentioned in said bill of complaint was never made, signed, executed or delivered and contemplated only an assignment of or lien upon a rent reserved in the lease of all this defendant's property and franchises, to the Sioux City and Northern Railroad for a term of one hundred years, without power of foreclosure upon the physical properties of the defendant or termination of said lease for or upon default in the conditions of said authorized mortgage.

And further in respect of said alleged mortgage purporting to be set forth in said bill of complaint, this defendant says that it is one for the execution whereof no officer or director of this defendant had any warrant or authority whatever, and the same in invalid and void, and especially are paragraphs third (3) and fourth (4) and that part of the fourth relating to application of the proceeds of insurance in case of officers, and that part of the fourth relating to charges of trustees, and in paragraphs five (5) and six (6) the part relating to sixty (60) days default and in paragraph seventh (7), the part relating to appointment of receivers and each paragraph of said alleged mortgage wos so unauthorized and void.

IV.

Fourth. This defendant further alleges that said trust deed if otherwise valid, is merely an assignment of the rents and profits and does not create any lien upon the property of the said Sioux City Terminal Railroad and Warehouse Company; and that prior to the execution and delivery of said trust deed to said Trust Company of North America, said Terminal Company had, by lease to the Sioux City and Northern Railroad Company parted with, assigned and transferred to the said Sioux City and Northern Railroad Company all of its interest in said property except the right to collect rents and profits, under certain leases, and the right to re-enter for condition broken, which last named rights were not transferred to said Trust Company of North America, and said Sioux City and Northern Railroad Company was, at and before the making of said alleged mortgage by this defendant to said complainant and ever since has been, in the full possession of all this defendant's property, purporting to be secured by said mortgage, and

this defendant was not then, and never since has been in any occupancy or possession of any of said property and that while said Sioux City and Northern Railroad Company was in possession of all this defendant's alleged mortgaged property as aforesaid to wit on the same day of the date of this defendant's alleged mortgage to said complainant, but whether before or afterward this defendant is ignorant, said Sioux City and Northern Railroad Company conveyed all its railroad properties of every description to the Manhattan Trust Company of New York, in mortgage and without actual or constructive knowledge or notice to said Manhattan Trust Company of said alleged mortgage to said complainant herein or of said lease by this defendant to said Sioux City and Northern Railroad Company and prior to any recording either of said lease or said mortgage to said complainant herein but whether said Manhattan Trust Company claims any lien or priority in the premises or not this defendant is ignorant.

V.

Fifth. This defendant further states that none of said bonds have any provision maturing said indebtedness on de-
73 fault, and said debt is not due nor was it due at the commencement of this suit, nor can said mortgage deed be foreclosed, as to said principal indebtedness.

This defendant prays that the Bill of Complaint be dismissed.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO.
By JOHN C. COOMBS and
HENRY J. TAYLOR,
Its Solicitors.

JOHN C. COOMBS,
HENRY J. TAYLOR, of Counsel.

Indorsed: No. 142. In the Circuit Court of the United States for the Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad and Warehouse Company. Answer. Filed Sept. 29, 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

74 And afterwards, to wit on the 16th day of October 1894 there was filed in the office of the Clerk of said Court in said cause, an Amendment to the Answer of E. H. Hubbard, Assignee, et al which amendment is in the words and figures following, to wit:

9283

In the Circuit Court of the United States for the Northern District of Iowa. Western Division.

AMENDMENT TO ANSWER

Trust Company of North America
vs.
Sioux City Terminal Railroad and Warehouse Company et al.

Come now the undersigned defendants and by leave of court first had and obtained, amend their answer by inserting in lieu of paragraph one as the same now is, the following:

These defendants admit that the Sioux City Terminal Railroad and Warehouse Company is a corporation organized and existing under the laws of the State of Iowa, and that the Union Loan & Trust Company is a corporation organized and existing under the laws of the State of Iowa, and that E. H. Hubbard is the assignee of the Union Loan & Trust Company and that the First National Bank of Montpelier Vermont First National Bank of Kewanee, Illinois, Garrett County National Bank of Oakland, Maryland, Naumkeag National Bank of Salem Massachusetts, Central National Bank of Middletown, Connecticut, Third National Bank of St. Louis, Missouri, Kenduskeag National Bank of Bangor, Maine, Credits Commutation Company, J. H. Queal & Co., and Hornick Hess & More are corporations as alleged in said Bill of Complaint.

These defendants admit that on the 14th day of December in the year 1889 the Sioux City Terminal Railroad & Warehouse Company was the owner of said real estate and franchises in said Bill of Complaint described; but deny that said company proposed to make and issue its negotiable bonds or obligations to the extent of $1,250,000.00 for the purchase of its ground for its line of railroad, or other purposes in said Bill of Complaint stated; and deny that said Sioux City Terminal Railroad and Warehouse Company became indebted to various persons who might become the holders of said bonds; deny that it did on said day, or at any time, by a vote of its stockholders or directors, authorize its officers to make and issue certain bonds or obligations to the extent and number, twelve hundred and fifty of the sum of $1000.00 or of any other sum either as shown in Exhibit A, or otherwise, and deny that to secure the payment of the same it executed to the Trust Company of North America any deed of trust on its property real or personal or upon its rights franchises and leases which it then owned or might thereafter acquire.

These defendants especially deny that either the said Sioux City Terminal Railroad & Warehouse Company or its stock-

holders or directors ever authorized its president or secretary or any of its officers to execute said mortgage set up in said bill of Complaint and allege that the said mortgage in its terms and provisions was wholly unauthorized and void, and that it is materially and radically and completely different in each of its paragraphs and provisions from any mortgage authorized by said Warehouse Company; and these defendants deny that said Warehouse Company on the first day of January or at any other time, executed or delivered to said Trust Company of North America any mortgage or deed of trust, either the
75 one stated in said Bill of Complaint as Exhibit B or otherwise, and deny that it ever executed and delivered to said Trust Company of North America any mortgage or deed of trust upon either the property in said bill of complaint described or any other property of said Warehouse Company; and allege that if its officers at any time executed any such instrument, such execution was wholly unauthorized and void, deny that any authorized mortgage executed to said Trust Company of North America included the leases from said Warehouse Company or any of them, or the rents profits and increase to be derived from said property or was made for the equal or ratable security of the holders of the alleged bonds in said bill of complaint described; deny that said Warehouse Company agreed with said Trust Company of North America to pay all taxes and assessments upon the premises or property alleged to be granted or the proper charges of the trustee, or reasonable disbursements incurred by or in the performance of the alleged duties of said Trust Company of North America, or to keep its structures and insurable property mortgaged well and sufficiently insured or to deposit the policies or certificates of insurance thereof with said trustee; denies that it agreed that in case default be made in the payment of the interest to accrue on any of said alleged bonds, or such interest should remain unpaid for sixty days after demand, or the party of the first part should allow any interest or taxes to fall in arrears, whereby the security of said mortgage might be impaired, or should refuse or fail to keep or perform any of the covenants or stipulations thereunder or in said alleged bonds contained, that the whole principal of said bonds with or without the interest accrued or alleged to be remaining unpaid thereon, should at the option of said trustee or otherwise become due or payable, deny that said Warehouse Company agreed that in case default should be made in the payment of any of the interest to accrue on said alleged bonds when the same should become due or payable, or should such interest remain unpaid or in arrears for a period of sixty days, or in case default should be made in the payment of the principal of said alleged bonds, when the same should become due and payable according to the tenor

thereof, whether by lapse of time or any default in the payment of interest, or if the said Warehouse Company should suffer or allow any taxes or charges to fall in arrears whereby the alleged security of said alleged mortgage might be impaired, that in either of these cases did it agree that it should be lawful for the alleged trustee to enter into or upon or to take possession of the railroad or property of said Warehouse Company, or to hold use or maintain or operate the same or the business of said Warehouse Company by its own managers, receivers superintendents, servants or otherwise.

These defendants deny that said Warehouse Company executed any mortgage entitling said trustee at its discretion to institute proceedings to foreclose said alleged mortgage whenever a majority of said bondholders might direct, or in the absence of any such direction then as said trustee might deem expedient; deny that said Warehouse Company executed any trust deed containing the provisions or any of them as stated in paragraph five of said bill of complaint, and allege that if any such instrument was executed by its of—— it was unauthorized and void and against the express instructions and resolution and determination of said Board of Directors of said Warehouse Company.

76 These defendants deny that any trust deed of said Warehouse Company was ever executed or delivered to said Trust Company of North America. These defendants deny that said Sioux City Terminal Railroad and Warehouse Company has executed or sold its said alleged bonds in accordance with the provisions of said alleged deed of trust or otherwise, in any amount and deny that it has received any of the proceeds of the sale of any of said bonds; and deny that any parties holding said alleged bonds hold them for value before maturity and without notice of defects therein; but allege that each and every holder of said alleged bonds received them with knowledge or with notice of such facts as to put them upon inquiry, that would have revealed that said bonds were wholly unauthorized by the Board of Directors and by the said corporation and were invalid for all the reasons in the answers of these defendants stated; that as to whether said alleged bonds on the first of January were paid or not, or presented or not, these defendants are ignorant or as to whether there was any fund with said alleged trustee to meet the same or not, or whether payment of said coupons was refused or not, or whether there remained unpaid taxes and assessments delinquent or otherwise or not, these defendants are ignorant, and therefore deny each of these allegations; as to whether said Warehouse Company has neglected to keep the property insured these defend-

ants are ignorant; these defendants deny that in pursuance of any terms or conditions contained in or expressed in any mortgage or trust deed from said Warehouse Company, or in any bonds to secure the same, or by reason of any defaults, the said trustee had any right or authority to proceed in behalf of said alleged bondholders to foreclose said mortgage; and deny that said alleged bondholders or a majority of them ever asked in writing or otherwise the said alleged trustee to declare the said indebtedness due and payable or to foreclose said property or sell the same or any of it, or to enforce the payment of said bonds; these defendants deny that said Warehouse Company covenanted and agreed that at any sale of the said property a majority in interest of said alleged bondholders might bid for the same or purchase the same for or in behalf of said alleged bondholders or that said alleged bonds might be used as the purchase price of the sale of any of the said property in lieu of cash or otherwise; these defendants deny that said Sioux City Terminal Railroad & Warehouse Company is the sole owner of the legal title to said property but on the contrary allege that E. H. Hubbard as trustee as in his answer stated, is the owner of said property by virtue of a deed to him as such trustee executed by and on behalf of said Warehouse Company.

These defendants and each of them admit that they have some right title and interest in said property or portions thereof, as in their answers alleged; and deny that their right, title or interest or the right, title, or interest of either of them, is inferior to the right, title or interest of said Trust Company of North America, but allege that the right title and interest of each and all of these defendants is superior to the right title and interest of said Trust Company of North America. These defendants admit the execution of said lease to said Sioux City & Northern Railroad but deny that the same was assigned or hypothecated to said Trust Company of North America.

These defendants further say that said E. H. Hubbard as assignee of said Union Loan and Trust Company was and is entitled to a lien upon all of said Sioux City Terminal Railroad & Warehouse Company's property and all securities that were or may have been issued on account thereof for the protection of the said Union Loan & Trust Company's endorsement upon and the payment of the notes of the said Sioux City Terminal Railroad and Warehouse Company as herein and in the
77 answer heretofore filed mentioned, and that by virtue of said assignment of said Union Loan & Trust Company a lien on all the property of said Sioux City Terminal Railroad & Warehouse Company's property passed to said E. H. Hubbard as assignee, and also by virtue of a conveyance in trust to

said E. H. Hubbard as trustee by and from said Sioux City Terminal Railroad and Warehouse Company of all its property free from all obligation on his part, to recognize or admit any priority, validity or lien or other incumbrance upon said property, to the said Trust Company of North America or to any other party. And said E. H. Hubbard especially asserts his several titles thereto without merger and in such order or election between them as on the facts in this case it shall appear that he is entitled.

And these defendants also allege that said Warehouse Company did not receive any of the proceeds of the sale of said alleged bonds to the knowledge of said trustee and alleged bondholders.

E. H. HUBBARD as assignee of the Union Loan and Trust Co.
E. H. HUBBARD, as Trustee.
FIRST NATIONAL BANK OF MONTPELIER, VT.
UNION LOAN & TRUST CO.
FIRST NATIONAL BANK OF KEWANEE, ILL.
GARRETT COUNTY BANK OF OAKLAND, MARYLAND.
NAUMKEAG NATIONAL BANK OF SALEM, MASS.
CENTRAL NATIONAL BANK OF MIDDLETOWN CONN.
THIRD NATIONAL BANK OF ST. LOUIS, MO.
KENDUSKEAG NATIONAL BANK OF BANGOR, MAINE.
CREDITS COMMUTATION COMPANY.

By JOHN C. COOMBS,
HENRY J. TAYLOR,
Their Solicitors.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Of Counsel.

Indorsed: In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad Warehouse Co. Amendment to Answer. Filed Oct 16", 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

78 And afterwards to wit on the 16th day of October 1894 there was filed in the office of the Clerk of said Court in said cause an Amendment to the Answer of Sioux City Terminal Railroad & Warehouse Co, which amendment is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa. Western Division.

AMENDMENT TO ANSWER.

Trust Company of North America
vs.
Sioux City Terminal Railroad and Warehouse Company et al.

Come now the undersigned defendants and by leave of Court first had and obtained, amend their answer by inserting in lieu of paragraph one as the same now is, the following:

These defendants admit that the Sioux City Terminal Railroad and Warehouse Company is a corporation organized and existing under the laws of the State of Iowa, and that the Union Loan & Trust Company is a corporation organized and existing under the laws of the State of Iowa, and that E. H. Hubbard is the assignee of the Union Loan & Trust Company and that the First National Bank of Montpelier Vermont First National Bank of Kewanee, Illinois, Garrett County National Bank of Oakland, Maryland, Naumkeag National Bank of Salem Massachusetts, Central National Bank of Middletown, Connecticut, Third National Bank of St. Louis, Missouri, Kenduskeag National Bank of Bangor, Maine, Credits Commutation Company, J. H. Queal & Co., and Hornick Hess & More are corporations as alleged in said Bill of Complaint.

These defendants admit that on the 14th day of December in the year 1889 the Sioux City Terminal Railroad & Warehouse Company was the owner of said real estate and franchises in said Bill of Complaint described; but deny that said company proposed to make and issue its negotiable bonds or obligations to the extent of $1,250,000.00 for the purchase of its ground for its line of railroad, or other purposes in said Bill of Complaint stated; and deny that said Sioux City Terminal Railroad and Warehouse Company became indebted to various persons who might become the holders of said bonds; deny that it did on said day, or at any time, by a vote of its stockholders or directors, authorize its officers to make and issue certain bonds or obligations to the extent and number, twelve hundred and fifty of the sum of $1000,00 or of any other sum either as shown in Exhibit A, or otherwise, and deny that to secure the payment of the same it executed to the Trust Company of North America any deed of trust on its property real or personal or upon its rights franchises and leases which it then owned or might thereafter acquire.

These defendants especially deny that either the said Sioux City Terminal Railroad & Warehouse Company or its stock-

holders or directors ever authorized its president or secretary or any of its officers to execute said mortgage set up in said bill of Complaint and allege that the said mortgage in its terms and provisions was wholly unauthorized and void, and that it is materially and radically and completely different in each of its paragraphs and provisions from any mortgage authorized by said Warehouse Company; and these defendants deny that said Warehouse Company on the first day of January or at any other time, executed or delivered to said Trust Company of North America any mortgage or deed of trust, either the
79 one stated in said Bill of Complaint as Exhibit B or otherwise, and deny that it ever executed and delivered to said Trust Company of North America any mortgage or deed of trust upon either the property in said bill of complaint described or any other property of said Warehouse Company; and allege that if its officers at any time executed any such instrument, such execution was wholly unauthorized and void, deny that any authorized mortgage executed to said Trust Company of North America included the leases from said Warehouse Company or any of them, or the rents profits and increase to be derived from said property or was made for the equal or ratable security of the holders of the alleged bonds in said bill of complaint described; deny that said Warehouse Company agreed with said Trust Company of North America to pay all taxes and assessments upon the premises or property alleged to be granted or the proper charges of the trustee, or reasonable disbursements incurred by or in the performance of the alleged duties of said Trust Company of North America, or to keep its structures and insurable property mortgaged well and sufficiently insured or to deposit the policies or certificates of insurance thereof with said trustee; denies that it agreed that in case default be made in the payment of the interest to accrue on any of said alleged bonds, or such interest should remain unpaid for sixty days after demand, or the party of the first part should allow any interest or taxes to fall in arrears, whereby the security of said mortgage might be impaired, or should refuse or fail to keep or perform any of the covenants or stipulations thereunder or in said alleged bonds contained, that the whole principal of said bonds with or without the interest accrued or alleged to be remaining unpaid thereon, should at the option of said trustee or otherwise become due or payable, deny that said Warehouse Company agreed that in case default should be made in the payment of any of the interest to accrue on said alleged bonds when the same should become due or payable, or should such interest remain unpaid or in arrears for a period of sixty days, or in case default should be made in the payment of the principal of said alleged bonds, when the same should become due and payable according to the tenor

thereof, whether by lapse of time or any default in the payment of interest, or if the said Warehouse Company should suffer or allow any taxes or charges to fall in arrears whereby the alleged security of said alleged mortgage might be impaired, that in either of these cases did it agree that it should be lawful for the alleged trustee to enter into or upon or to take possession of the railroad or property of said Warehouse Company, or to hold use or maintain or operate the same or the business of said Warehouse Company by its own managers, receivers superintendents, servants or otherwise.

These defendants deny that said Warehouse Company executed any mortgage entitling said trustee at its discretion to institute proceedings to foreclose said alleged mortgage whenever a majority of said bondholders might direct, or in the absence of any such direction then as said trustee might deem expedient; deny that said Warehouse Company executed any trust deed containing the provisions or any of them as stated in paragraph five of said bill of complaint, and allege that if any such instrument was executed by its of—— it was unauthorized and void and against the express instructions and resolution and determination of said Board of Directors of said Warehouse Company.

80 These defendants deny that any trust deed of said Warehouse Company was ever executed or delivered to said Trust Company of North America. These defendants deny that said Sioux City Terminal Railroad and Warehouse Company has executed or sold its said alleged bonds in accordance with the provisions of said alleged deed of trust or otherwise, in any amount and deny that it has received any of the proceeds of the sale of any of said bonds; and deny that any parties holding said alleged bonds hold them for value before maturity and without notice of defects therein; but allege that each and every holder of said alleged bonds received them with knowledge or with notice of such facts as to put them upon inquiry, that would have revealed that said bonds were wholly unauthorized by the Board of Directors and by the said corporation and were invalid for all the reasons in the answers of these defendants stated; that as to whether said alleged bonds on the first of January were paid or not, or presented or not, these defendants are ignorant or as to whether there was any fund with said alleged trustee to meet the same or not, or whether payment of said coupons was refused or not, or whether there remained unpaid taxes and assessments delinquent or otherwise or not, these defendants are ignorant, and therefore deny each of these allegations; as to whether said Warehouse Company has neglected to keep the property insured these defendants are ignorant; these defendants deny that in pursuance

of any terms or conditions contained in or expressed in any mortgage or trust deed from said Warehouse Company, or in any bonds to secure the same, or by reason of any defaults, the said trustee had any right or authority to proceed in behalf of said alleged bondholders to foreclose said mortgage; and deny that said alleged bondholders or a majority of them ever asked in writing or otherwise the said alleged trustee to declare the said indebtedness due and payable or to foreclose said property or sell the same or any of it, or to enforce the payment of said bonds; these defendants deny that said Warehouse Company covenanted and agreed that at any sale of the said property a majority in interest of said alleged bondholders might bid for the same or purchase the same for or in behalf of said alleged bondholders or that said alleged bonds might be used as the purchase price of the sale of any of the said property in lieu of cash or otherwise; these defendants deny that said Sioux City Terminal Railroad & Warehouse Company is the sole owner of the legal title to said property but on the contrary allege that E. H. Hubbard as trustee as in his answer stated, is the owner of said property by virtue of a deed to him as such trustee executed by and on behalf of said Warehouse Company.

These defendants and each of them admit that they have some right title and interest in said property or portions thereof, as in their answers alleged, and deny that their right, title or interest or the right, title, or interest of either of them, is inferior to the right, title or interest of said Trust Company of North America, but allege that the right title and interest of each and all of these defendants is superior to the right title and interest of said Trust Company of North America; these defendants admit the execution of said lease to said Sioux City & Northern Railroad but deny that the same was assigned or hypothecated to said Trust Company of North America.

These defendants further say that said E. H. Hubbard as assignee of said Union Loan and Trust Company was and is entitled to a lien upon all of said Sioux City Terminal Railroad & Warehouse Company's property and all securities that were or may have been issued on account thereof for the protection of the said Union Loan & Trust Company's endorsement upon and the payment of the notes of the said Sioux City Terminal Railroad and Warehouse Company as herein and in the
81 answer heretofore filed mentioned, and that by virtue of said assignment of said Union Loan & Trust Company a lien on all the property of said Sioux City Terminal Railroad & Warehouse Company's property passed to said E. H. Hubbard, as assignee, and also by the virtue of a conveyance in trust to said E. H. Hubbard, as trustee, by and from said Sioux City Terminal Railroad and Warehouse Company of all its prop-

erty free from all obligation on his part, to recognize or admit any priority, validity or lien or other incumbrance upon said property to the said Trust Company of North America or to any other party; and said E. H. Hubbard especially asserts his several titles thereto without merger and in such order or election between them as on the facts in this case it shall appear that he is entitled.

And these defendants also allege that said Warehouse Company did not receive any of the proceeds of the sale of said alleged bonds to the knowledge of said trustee and alleged bondholders.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO.
By JOHN C. COOMBS,
HENRY J. TAYLOR,
Its Solicitors.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Of Counsel.

Indorsed: 142. In the Circuit Court of the United States for the Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad & Warehouse Company. Amendment to Answer. Filed Oct. 16", 1894. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

82 And on the 25th day of May 1895 there was filed in the office of the Clerk of said Court in cause No. 142 a Stipulation as to outstanding indebtedness, which stipulation is in the words and figures following, to wit:

In the United States Circuit Court Northern District of Iowa
Western Division.

Trust Company of North America, Plaintiff,
vs.
Sioux City Terminal Railroad & Warehouse Company et al,
Defendants.

It is hereby stipulated by and between the parties hereto, that there are outstanding due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company negotiated through the Union Loan & Trust Company under its endorsement, to the amount of seven hundred eighteen thousand dollars ($718,000) being the notes purporting to be secured by Exhibit 8, in evidence purporting to be a deed from the Sioux City Terminal Railroad & Warehouse Company to E. H. Hubbard, trustee for the benefit and security of said notes.

And it is further admitted that the amount of alleged railroad syndicate indebtedness referred to in the evidence of John

Hornick as being between $3,100,000 and $3,200,000 at the time of the failure of the Union Loan & Trust Company is still outstanding and unpaid in the sum of three million one hundred thousand dollars ($3,100,000).

TRUST COMPANY OF NORTH AMERICA,
By JOY, CALL & JOY,
Its Attorneys and Solicitors.
E. H. HUBBARD,
Assignee of the Union Loan & Trust Company.
E. H. HUBBARD, Trustee.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY; and the other parties answering in connection with these named in their amendment to answer filed herein October 16, 1893.

By SPALDING, TAYLOR & BURGESS,
Its Attys. & Sols.

Indorsed: 142. Equity. United States Circuit Court, Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad & Warehouse Co. et al. Stipulation. Filed May 25, 1895. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

83 And on the 12th day of August 1895 there was filed in the office of the Clerk of said Court in cause No. 142, Equity, a motion to intervene on part of Credits Commutation Company, and the Petition of Intervention of said Credits Commutation Company, which are in the words and figures following, to wit:

Circuit Court of the United States, Northern District of Iowa.
Western Division.

MOTION TO INTERVENE ON PART OF CREDITS COMMUTATION COMPANY.

First National Bank of Montpelier, Vermont, Plaintiff,
vs.
Sioux City Terminal Railroad & Warehouse Co., Defendant

Trust Company of North America, Intervener,
vs.
Sioux City Terminal Railroad & Warehouse Co., E. H. Hubbard, Trustee Assignee et al, Respondents.

Now comes the Credits Commutation Company, a corporation duly created and organized and existing under the laws of the State of Iowa, and having its principal place of business at Sioux City, Woodbury County, in said State, and says that it has recently recovered a judgment against said Sioux City Ter-

minal Railroad & Warehouse Company in the District Court within and for said Woodbury County and State of Iowa, for six hundred and sixteen thousand five hundred dollars ($616,500) principal or damages, and seventy-five thousand five hundred ninety-six dollars and ninety-five cents ($75,596.95) interest thereon, and twelve and 50/100 dollars ($12.50) costs, which judgment, including interest and costs is still outstanding, due, payable, and wholly unsatisfied and unpaid and unappealed from as more fully appears in the petition hereto annexed.

That it is a valid and subsisting judgment and it is only since the hearing in said case that your petitioner was informed that said Trust Company of North America asserted an alleged estoppel or a want of equity in a certain conveyance of said Sioux City Terminal Railroad & Warehouse Company to E. H. Hubbard, Trustee, parties to said proceedings, on which conveyance your petitioner has relied for the protection of its interests, which interests in the form of the judgment aforesaid are free from any of said alleged estoppels or wants of authority.

That since said hearing your petitioner has also discovered new evidence which your petitioner is advised may be pertinent to the issues herein involved, but your petitioner will, without prejudice to its rights to be established, should said cause be re-opened for the taking of evidence, submit to an order as a condition to the granting of this motion to intervene, that it be admitted upon the evidence as it now is, together with the exemplification of said judgment of said Credits Commutation Company, and said Credits Commutation Company files herewith and offers in evidence a complete, true, and duly certified exemplification of its said judgment and all pleadings on which the same is based in its petition of intervention referred to,
84 being the judgment entered and recovered in the District Court of Iowa, in and for Woodbury County, on the 23rd day of July 1895, and asks that the same be admitted and considered by this Court, in support of the supplemental brief to be filed by E. H. Hubbard, Trustee et al, pending the decision for which the case is now held by this Court.

CREDITS COMMUTATION COMPANY,
By JOHN C. COOMBS,
HENRY J. TAYLOR,
Its Solicitors.

JOHN C. COOMBS,
Of Counsel.
Equitable Building, Boston, Mass.

Indorsed: No. 142. Equity. In the Circuit Court of the United States, Northern District of Iowa, Western Division.

First National Bank of Montpelier, Plff., vs. Sioux City Terminal Railroad & Warehouse Co., defendant; Trust Company of North America, Intervener, vs. Sioux City Terminal Railroad & Warehouse Co., E. H. Hubbard, Trustee and Assignee, et al, respondents. Motion to intervene on part of Credits Commutation Company. John C. Coombs and Henry J. Taylor, Solicitors. Filed August 12, 1895. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

Circuit Court of the United States, Northern District of Iowa. Western Division.

PETITION OF INTERVENTION OF CREDITS COMMUTATION COMPANY.

First National Bank of Montpelier, Vermont, Plaintiff,
vs.
Sioux City Terminal Railroad & Warehouse Company, Defendant.

Trust Company of North America, Intervener,
vs.
E. H. Hubbard, Trustee et al, Respondents.

To the Honorable the Judges of the Circuit Court, sitting in Equity within and for the Northern District of Iowa, Western Division:

Respectfully represents your petitioner, the Credits Commutation Company:

First. Your petitioner is a corporation duly created organized and existing under the laws of the State of Iowa, and is a citizen and resident of that State having its principal place of business in Sioux City, Woodbury County, in said State and is a judgment creditor of said defendant, the Sioux City Terminal Railroad & Warehouse Company as hereinafter mentioned:

Second. Said defendant the Sioux City Terminal Railroad & Warehouse Company hereinafter often designated as the Terminal Company purports to be created and organized under the laws of the State of Iowa, of which State it is a citizen and resident, having its principal place of business at Sioux
85 City, Iowa; the limit of its authorized capital is one million of dollars, by its Articles of Association and the publication thereof, made in pursuance thereof, under the Statute laws of Iowa, and the amount of indebtedness which said Company could contract was limited to two-thirds the amount of its paid up capital stock, and by the laws of the State of

Iowa under which alone said Company purports to be organized, it is prohibited from contracting indebtedness at least in excess of two-thirds of its capital stock, and your petitioner alleges that under the laws of Iowa, said corporation, The Terminal Company is not authorized to mortgage its property or franchises or after acquired property, nor do its articles purport to grant power to mortgage its franchises.

Third. All the capital stock of said Terminal Company was issued actually or substantially without any consideration, and, as your petitioner is informed and believes at a time when only two hundred thousand dollars in amount of the par value thereof had been subscribed for, and even that had not been paid up in any way, the alleged mortgage herein sought to be foreclosed by the Trust Company of North America was fully executed and delivered by and between the officers of all parties thereto.

Fourth. The purpose for which said defendant, the Terminal Company, was formed, was the acquisition, improvement and operation of railroad terminal depots, station and terminal grounds in Sioux City Iowa, and in pursuance thereof, said Company did in fact acquire before and after the execution of said mortgage, large tracts of valuable land in said Sioux City and improved the same at great outlay and expense by the erection of railway tracks, stations, depots, warehouses and other terminal facilities thereon.

Fifth. That A. S. Garretson, D. T. Hedges, John Hornick and Ed. Haakinson, all of said Sioux City, constituted and composed a co-partnership known as "the railroad syndicate" and owned and controlled all said Terminal Company and were prosecuting the enterprise thereof in connection with the construction, promotion and acquisition of other transportation and railway properties and facilities, and in the first instance, raised substantially all the money used in all these undertakings on promissory notes made or furnished by said syndicate and the members thereof and signed by themselves or companies which they controlled, which notes of the sum of not to exceed five thousand dollars each, were indorsed and negotiated by the Union Loan & Trust Company of Sioux City, and were taken held and discounted by the banks and bankers throughout the country, though almost wholly outside of said State of Iowa, all induced and enabled by the representation of said Union Loan & Trust Company, made with the full knowledge of all said railroad syndicate and the connivance of the representatives thereof, that the makers of said notes had deposited with the Union Loan & Trust Company ample collaterals for the security and payment of said notes. And this account of said railroad syndicate thus manipulated through said

Union Loan & Trust Company was a single, joint account of said syndicate, which, though constantly changing in the names signed to the notes discounted by any one of the banks to which said Union Loan & Trust Company on behalf of said railroad syndicate and the makers negotiated the same, was constantly increasing with the expansion and development of said syndicate enterprises, commencing so far as notes signed by the Terminal Company is concerned, in September, 1889, from which time to the failure of the Union Loan and Trust Company by substitutions and renewals, said Terminal indebtedness was continued, and at the time of the failure of said Union Loan & Trust Company which occurred on or about the twenty-fifth day of April 1893, the amount of said notes so made or furnished by said syndicate and negotiated to and held by banks
86 and bankers in other States, was over three millions of dollars, of which those signed by the Terminal Company constituted nearly one-quarter, or about seven hundred and eighteen thousand dollars in amount of the par or face value of the same, all of which are still outstanding, due, payable and wholly unpaid and so admitted by the stipulation and agreement of the Trust Company of North America filed herein and made a part of the evidence of this cause.

Sixth. And your petitioner says that though said Terminal Company may have received some of the proceeds of said bonds purporting to be secured by the alleged mortgage held by said Trust Company of North America and by said last named Company in these proceedings sought to be foreclosed, and may have applied such proceeds towards the payment of these outstanding Terminal notes, and though the proceeds of no other notes furnished by said syndicate may have been expended on said terminal property, and the proceeds of no terminal notes or bonds expended on other syndicate enterprises, yet your petitioner says, on information and belief, that said Terminal note account with and negotiated through said Union Loan & Trust Company as aforesaid, either taken by itself or as a part of the whole railroad syndicate account aforesaid, was never terminated nor quite or even nearly liquidated by the proceeds of the bonds purporting to be secured by said alleged mortgage to said Trust Company of North America, and has continued as an unbroken account from the inception thereof in September 1889, and the proceeds of all of which were expended in the acquisition and improvement of said Terminal property by said Terminal Company, the balance whereof, as reduced by the application of any proceeds of said alleged Terminal mortgage bonds or otherwise, was by substitutions and renewals represented by said Terminal notes

outstanding at the time of said failure of said Union Loan & Trust Company as aforesaid.

Seventh. Your petitioner says that there was not in the possession of said Union Loan & Trust Company at the time of the failure thereof, any substantial collateral and none of any substantial value furnished by said Terminal Company or any other party as security or for the payment of its said outstanding notes, though in the midst of said failure, said Terminal Company purported to make the mortgage to the Union Loan & Trust Company first in these proceedings sought by said First National Bank of Montpelier Vermont to be foreclosed, but which was never accepted by this intervener [not] its assignors.

Eighth. That soon after the institution of the proceedings herein of said First National Bank of Montpelier, Vermont, the creditors of said Union Loan & Trust Company holding nearly all of said railroad syndicate notes, completed an organization among themselves in the formation and incorporation of your petitioner, to whom they assigned transferred and delivered all these said railroad syndicate notes with all the rights, remedies, benefits, interests and consideration pertaining thereto.

Ninth. That at or about the time last above mentioned, the representatives of this petitioner's organization became invested in the offices and duties of the general officers and directors of said Terminal Company and soon afterwards the Manhattan Trust Company sought by intervention in these proceedings to have said mortgage which said First National Bank of Montpelier, Vermont, had just sought to have foreclosed, as aforesaid, declared fraudulent and void, and in the support of such intervention and relief, filed affidavits of the utter insolvency of said Terminal Company and further reference is made in that behalf to the allegations of insolvency of said Terminal Company in the petition or bill of complaint of said Trust Company of North America.

87 Tenth. That thereupon said Terminal Company entered upon all the property to terminate a lease thereof then existing to the Sioux City & Northern Railroad Company for the term of one hundred years and immediately conveyed all and singular its said property to said E. H. Hubbard, in trust for the benefit of all holders of said outstanding Terminal notes, and without subjecting said conveyance to a priority or validity of any alleged mortgage, lien or indebtedness of or on said Terminal property whatsoever.

Eleventh. In said original proceedings herein also contemporaneously with said Manhattan Trust Company, said Trust Company of North America, also intervened and sought and obtained the relief to which it would then have been entitled if its said alleged mortgage were valid, to wit, an order for the collection of rentals under sub-leases of said Terminal property made by said Sioux City & Northern Railroad Company; at that time there had been breach of the condition of said alleged mortgage, but there had been no default in said alleged mortgage to the Trust Company of North America, at the time of the execution of said trust deed by said Terminal Company to said Hubbard.

Twelfth. That said First National Bank of Montpelier, Vermont, and such associate creditors as it had, instituted the original proceedings herein primarily to secure a protection of said Terminal property by the court, and without sufficient information or apprehension of the probable worthlessness of the security it sought to foreclose, wherefore, on the interventions aforesaid, the validity of said security being assailed and denied for alleged fraud, and it being apparent that in the form in which it was given and the reissues of notes it [purporyed] to secure that it was worthless and excessive, the said alleged mortgage and said alleged notes were rejected and not accepted even by the plaintiffs in said Montpelier suit; and on the re-entry by said Terminal Company to terminate said lease to said Sioux City & Northern Railroad Company, and the conveyance of all said Terminal property to said Hubbard, said proceeding for foreclosure herein by said National Bank of Montpelier were practically abandoned; the Terminal notes purporting to be secured by said mortgage to said Hubbard were not the Terminal notes hereinbefore referred to, and on a part of which said Credits Commutation Company secured its judgment, but were notes so placed by said Terminal Company with said Union Loan & Trust Company at or about the time of the failure thereof as security for said outstanding notes with the intention of exchange therefor but only five thousand dollars in amount was ever exchanged and the said mortgage was so given without the knowledge or consent of the holders of said outstanding notes, and has never been by them accepted, nor by this Credits Commutation Company, nor its assignors; that by purchase, assignment and delivery to said Credits Commutation Company, it became the holder and owner of the Terminal notes so put into its said judgment against said Terminal Company, and soon afterwards for alleged breach subsequently occurring, said Trust Company filed its petition of foreclosure herein; your petitioner is informed that on the trial of said petition of foreclosure, said Trust Com-

pany of North America sought to sustain the validity and effect of said alleged mortgage held by it, notwithstanding its apparent violation of law, and certain void and unlawful provisions thereof, and of the indebtedness purporting to be thereby secured, on the ground that said Hubbard Trustee who, claiming under the conveyance or trust deed made to him by said Terminal Company as hereinbefore stated denied the validity of said mortgage so made, was barred, by certain disabilities and the want of equity which it was urged by said Trust Company would have estopped said Terminal Company itself, under which company said Hubbard claimed title, and by which he also should be estopped.

88 Thirteenth. Your petitioner who, since its organization as aforesaid had acquired nearly all of the outstanding Terminal Company notes, was advised that if it should put the Terminal Company notes so held by it into the form of a judgment against said Terminal Company, it would by reason of the lien thereof, adverse to said Terminal Company and not under it, have full standing herein to defend against and deny the validity of said alleged mortgage held by said Trust Company of North America, and the indebtedness therein referred to free from estoppel for want of equity or because of equal wrong-doing on its own part, and your petitioner brought suit on said Terminal Company notes, being notes stipulated by the Trust Company of North America herein as a part of the record to be valid, binding, due, payable and wholly unpaid, which is stipulated by the Trust Company of North America to be true of each and every note so entering into the said judgment and made the basis of this intervention and therefore, the said Credits Commutation Company on the 23rd day of July 1895, filed its petition at law against the Sioux City Terminal Railroad & Warehouse Company in the District Court of Iowa in and for Woodbury County, claiming judgment against said Terminal Company in the sum of six hundred and sixteen thousand five hundred dollars, as principal of said notes, and seventy-five thousand five hundred ninety-six and 95/100 dollars as interest due thereon. That said Terminal Company appeared therein and filed answer thereto, and on the said 23rd day of July 1895, the said cause came on for hearing and determination, all parties thereto appearing and on the said 23rd day of July 1895, there was duly made and entered in the said District Court of Iowa, in and for Woodbury County, a court of general jurisdiction, a judgment in favor of the Credits Commutation Company and against the Sioux City Terminal Railroad & Warehouse Company, in the sum of six hundred sixteen thousand five hundred dollars principal, and seventy-five thousand five hundred ninety-six

and 95/100 dollars interest and twelve and 50/100 dollars costs, which judgment is still outstanding, valid and wholly unpaid, and unappealed from, and your petitioner attaches hereto and makes a part hereof, a true, complete and duly certified exemplification of all the records, entries and judgment in said cause, to wit the petition of the plaintiff, the Credits Commutation Company, the answer of the Sioux City Terminal Railroad & Warehouse Company, the judgment of the Court in the said cause and execution issued thereon and thereunder, and returned nulla bona under the certificate of the Sheriff of Woodbury County Iowa, which and all of which are attached hereto as Exhibit "A" by a true complete and duly certified transcript and exemplification and are offered in evidence herewith, as a part hereof and of this cause which judgment is still wholly owned and held as the sole property of your petitioner.

Fourteenth. Your petitioner says that the notes so held by it on which judgment was recovered as aforesaid, constituted all the indebtedness for the benefit of the holders whereof said conveyance or trust deed was made by said Terminal Company to said E. H. Hubbard Trustee, as hereinbefore set forth, except one hundred thousand dollars represented by twenty notes of said Terminal Company and held by various parties unknown to your petitioner, for whose benefit, in so far as they may have standing or for the benefit of such of them as may choose to join herein and bear their part of the costs and expenses thereof as well as for its own benefit, this petitioner brings this petition of intervention.

Fifteenth. Your petitioner is advised that by stipulation between counsel herein, the indebtedness of said Terminal Company held by your petitioner and on which judgment was recovered as aforesaid, as well as all other indebtedness of said Terminal Company for the benefit of the holders whereof said conveyance or trust deed was made by said Terminal Company to said Hubbard is admitted to be valid, outstand-
89 ing and wholly unpaid indebtedness of said Terminal Company, and your petitioner on information and belief says that such is the fact and that all said indebtedness was contracted to bona fide holders thereof for value and without notice by or to any of them of defense or defect thereto or therein, and without knowledge or notice on the part of any of said holders of the existence of said alleged mortgage to said Trust Company of North America, or of the indebtedness purporting to be thereby secured or that the stock of said Terminal Company had not been fully paid up or that said Terminal Company ever contracted any indebtedness in excess of

two-thirds the amount of its capital stock, and without knowledge or notice on the part of any one of said holders that said Terminal Company owed any indebtedness except such as he himself held.

Sixteenth. Your petitioner, while claiming adversely to said Terminal Company for the purpose of freedom from estoppel to deny the validity of said alleged mortgage to said Trust Company of North America, nevertheless concedes priority to the deed and title made by said Terminal Company to said Hubbard for the benefit of your petitioner and others holders of said Terminal Company's outstanding notes and if and in so far as the validity and effect may be sustained and to that extent with any advantage, benefit or priority of the alleged mortgage to the Trust Company of North America, and only and if said alleged mortgage to said Trust Company of North America, or the indebtedness purporting to be thereby secured shall be finally held or conceded to be invalid so that said conveyance to said Hubbard may take effect free from any priority by or in behalf of said alleged mortgage or of any alleged equitable lien in substitution therefor, this petitioner will subordinate and waive in behalf of said conveyance to said Hubbard all rights and liens under the judgment obtained by your petitioner as hereinbefore set forth, but not otherwise. And your petitioner intervenes herein in support of the claim and title and the priority thereof asserted in the proceeding by said E. H. Hubbard as Trustee.

Seventeenth. And your petitioner on advice, information and belief, says that said alleged mortgage herein sought by said Trust Company of North America to be foreclosed, as well as the bonds purporting to be thereby secured, are all and every one invalid and void or voidable by and in behalf of your petitioner. That the amount of said bonds outstanding is far in excess of the whole capital of said Terminal Company and that the indebtedness thus created was a violation of the express prohibition of the Statutes of Iowa, and a violation of the same and of the charter of the Terminal Company, and was therefore unlawful, and was not only constitutionally but actually and consciously known to be so by all the parties thereto, at the time of the creation thereof, and said violation of law and of the inhibition of the law was willful, and was connived at by and between the said Terminal Company and the said Trust Company of North America, and the principal takers of all of said bonds upon the first sale or issue of the same, and each and every of said bonds conveys notice upon its face to every taker of the same of the amount of the whole issue thereof, which together with the published arti-

cles of the incorporation of said Sioux City Terminal Railroad & Warehouse Company show said indebtedness to be unlawful, and under the laws of Iowa, said Terminal Company organized for construction of Union Railway depots, could not lawfully mortgage its property or franchises at all, nor after acquired property nor its franchises under its charter powers, and said mortgage to said Trust Company of North
90 America is wholly ultra vires, void and against public policy and said Terminal Company had no authority, power or capacity to make said alleged agreement.

Eighteenth. Your petitioner further shows by reference to said alleged mortgage and the lease by said Terminal Company to said Sioux City & Northern Railroad Company, subject to which said alleged mortgage was made, copies of both of which said instruments are annexed to the petition of said Trust Company of North America that by reason of the rights, powers and interests secured to and reserved by said lessor and lessee under said lease and not surrendered or conveyed by said alleged mortgage, the security thereof was always practically valuless and was substantially destroyed by the reentry of said Terminal Company to terminate the lease of said alleged mortgaged premises and the conveyance of said premises to said Hubbard as Trustee; that said alleged mortgage is altogether uncertain in the estate or interest it purports to convey and in and because of many of the powers and provisions it contains it should be declared void under the rule against perpetuities, and of all the facts recited herein of the invalidity of said mortgage to said Trust Company of North America, and the indebtedness purporting to be thereby secured, this Trust Company of North America and each and every bondholder has always had and been charged with knowledge and notice.

Wherefore your petitioner prays that said alleged mortgage purporting to be made by said Sioux City Terminal Railroad & Warehouse Company to said Trust Company of North America, dated January 1st, A. D. 1890 in the proceedings sought to be foreclosed and all the bonds of said Terminal Company, purporting to be thereby secured, be all and singular declared null and void, and not enforcible herein by foreclosure or otherwise; that all alleged mortgages purporting to have been made by said Terminal Company to said Union Loan & Trust Company be also held and declared to be null and void.

That the conveyance made by said Terminal Company to said E. H. Hubbard after re-entry by said Company for breach of the condition of the lease of its property to said Sioux City & Northern Railroad Company be sustained as passing a free and unincumbered title and possession of all and singular the property of said Terminal Company to said Hubbard for the purposes and in the trust therein declared.

That your petitioner's judgment-lien be held and declared to constitute a first and paramount lien on all the property and assets of said Terminal Company, free from all estoppel or want of equity because of any contracts, conveyances, acts, or deeds made or done by said Terminal Company except and subject only to said conveyance by said Terminal Company to said E. H. Hubbard Trustee, and subject to that only in so far as said conveyance may be held free from and unimpaired by any alleged estoppel or want of equity as against or to deny the validity of said alleged mortgage to said Trust Company of North America and any indebtedness purporting to be thereby secured.

That if said alleged mortgage to said Trust Company of North America or the indebtedness purporting to be thereby secured shall be in any respect sustained or if under any present or future pleadings, herein, by said Trust Company of North America other substituted or alleged equivalent equitable relief should be sought, then that said mortgage may be construed in connection with said lease for one hundred years made by said Terminal Company to said Sioux City & Northern Railroad Company, and be held and declared to embrace no title, property or interest except the reversion of said Terminal property at the end of said term with a right in the meantime after default to collect the rentals under these existing sub-leases made by said Sioux City & Northern Railroad Company and that the re-entry by said Terminal
91 Company for breach of covenant of said lease for the purpose of said conveyance to said Hubbard for the benefit of your petitioner and others, be not held to have merged said lease in said reversion as mortgaged so as to expedite or enlarge said mortgaged estate or advance any title or right to possession under the same, and so as to deprive your petitioner of his said judgment-lien on said term, and that in no event may said mortgage to said trust Company of North America be awarded any lien in or upon any property or assets of said Terminal Company in priority or superior to the judgment-lien of your petitioner, which judgment-lien, however, and all benefit under the same in so far as not impaired by estoppels or alleged want of equities pertaining to, and in

so far as its operation is confined and limited to any estate or interest which otherwise should be held to have passed to said Hubbard, Trustee by said conveyance of said Terminal Company to him, the relief herein sought is expressly subordinated to said conveyance and this intervention filed in supplement thereof.

Your petitioner prays for such other and further relief as the nature and circumstances of this case may require and to your Honors shall seem meet.

Your petitioner prays that said Trust Company of North America, said Sioux City Terminal Railroad & Warehouse Company and said E. H. Hubbard, as trustee and as assignee all parties thereto, may each of them be required to answer this petition severally and respectively, but not under oath, the benefit of answers under oath being hereby expressly waived.

[Seal] CREDITS COMMUTATION COMPANY,
By F. L. EATON,
Secretary & General Manager, and
By JOHN C. COOMBS,
HENRY J. TAYLOR,
Its Solicitors.

JOHN C. COOMBS, of Counsel.

EXHIBIT "A."

In the District Court of Iowa in and for Woodbury County.

PETITION AT LAW.

Credits Commutation Company, Plaintiff,
vs.
Sioux City Terminal Railroad & Warehouse Company, Defendant.

Comes now the Credits Commutation Company and for cause of action against the defendant, states:

1. That plaintiff is a corporation created, organized and existing under and by virtue of the laws of the State of Iowa, and that the Sioux City Terminal Railroad & Warehouse Company is a corporation created and existing under and by virtue of the laws of the State of Iowa.

2. That at various times in the years 1892 and 1893 the said Sioux City Terminal Railroad & Warehouse Company executed and delivered to the Union Loan & Trust Company, a corporation of Sioux City, Iowa, its several written promissory notes all of the form and wording of Exhibit "A"

92 hereto attached, and made a part of this petition, except that said Exhibit "A" does not show the dates and amounts of said several notes, which said dates and amounts are as shown by and upon the schedule or list of said notes hereto attached marked Exhibit "B" which last named exhibit is also made a part of this petition.

3. That on the dates of the execution and delivery of said several notes to the Union Loan & Trust Company, and on the same dates that said several notes bear date, the said Union Loan & Trust Company, for a valuable consideration and before maturity sold, assigned and delivered, with its indorsement waiving protest thereon, the said notes to divers banks and bankers in various parts of the United States, the form and working of said several indorsements all being in the form and words as shown upon the back of said Exhibit A, except that the form and wording of the indorsement upon the back of Exhibit "A" does not show or contain the names of the assignees or indorsees of said several notes, the names and addresses of such indorsees and assignees or purchasing banks and bankers of said paper, and the amount and date of the note or notes purchased by them respectively being as shown and described in and upon the schedule or list of notes hereto attached and marked Exhibit "B" as aforesaid.

4. That the purchasers of said several notes from the Union Loan & Trust Company or from the assignees or indorsees of said Union Loan & Trust Company described and shown in said list or schedule Exhibit "B" sold, assigned and delivered the same and all of the same to the Credits Commutation Company, plaintiff herein, for a valuable consideration, and said Credits Commutation Company is now the holder and owner of each and all of said notes, to wit, one hundred and fourteen (114) notes, in the amount of five thousand dollars ($5,000) each, two (2) notes in the amount of three thousand dollars ($3,000) each, twelve (12) notes in the amount of two thousand five hundred dollars ($2,500) each three (3) notes in the amount of two thousand dollars ($2,000) each, one (1) note in the amount of one thousand five hundred dollars ($1,500) and three (3) notes in the amount of one thousand dollars ($1,000) each, being the notes described and shown in the list or schedule marked Exhibit "B" hereto attached and each being in the form and wording of Exhibit "A," except that said several notes vary in dates and amounts.

5. That the said indebtedness herein declared upon may be further designated as a portion of that represented by certain notes aggregating seven hundred and eighteen thousand dollars ($718,000) in amount of the Sioux City Terminal Rail-

road & Warehouse Company for the benefit of the holders whereof, and its overdraft for ten thousand dollars ($10,000) the said defendant made a certain conveyance of its property in Sioux City, Iowa, to E. H. Hubbard Trustee, dated December 23, 1893, and duly recorded in the office of the Recorder of Deeds of Woodbury County, Iowa, on the 23rd day of December 1893, and judgment is herein prayed without prejudice to any rights or interests which the plaintiff may have as a holder of said notes under said trust deed.

6. That all of said notes are past due, and there is now due and owing from the Sioux City Terminal Railroad & Warehouse Company to the Credits Commutation Company, the sum of six hundred and sixteen thousand five hundred dollars ($616,500) as principal, and interest on said notes from the date of their maturity severally at six per cent per annum, amounting in the aggregate to seventy-five thousand five hundred ninety-six dollars and ninety-five cents ($75,596.95) making a total sum of six hundred ninety-two thousand ninety-six dollars and ninety-five cents ($692,096.95) no part of which has been paid, and all of the same is owing, due and payable.

Wherefore, the Credits Commutation Company demands judgment against the said defendant, Sioux City Ter-
93 minal Railroad & Warehouse Company in the sum of six hundred ninety-two thousand ninety-six dollars and ninety-five cents ($692,096.95) together with interest thereon from July 23, 1895, and for costs of suit, and prays that said judgment may be without prejudice or damage to any rights or interests which plaintiff may have as a holder of said notes under said deed of trust.

SPALDING, TAYLOR & BURGESS,
Attorneys for Pltff.

State of Iowa,
Woodbury County—ss.

I, E. A. Burgess, being first duly sworn, on oath depose and say, that I am one of the attorneys for plaintiff, in the above entitled cause of action; that I have read the foregoing petition; that I have as full knowledge of the facts and matters stated in said petition as has plaintiff or any officer of plaintiff; that I have personal knowledge of the contents of said petition, and that the statements and allegations therein made are true as I verily believe.

E. A. BURGESS.

Subscribed in my presence and sworn to before me by the said E. A. Burgess, this 22 day of July A. D. 1895.

[Seal] MAMIE E. BROOKS,
Notary Public within & for Woodbury County, State of Iowa.

Filed July 23, 1895. W. S. Belden, Clerk. By L. E. Lambert, Deputy.

EXHIBIT "A."

$..... Sioux City, Iowa,.....189..

.....(without grace) after date we promise to pay to the order of The Union Loan & Trust Company,..... Dollars, value received payable at Sioux National Bank in current funds (or will pay in exchange on Boston or New York if desired).

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY.

By A. S. GARRETSON, President.

No....., due.....

Indorsed: Pay to the order of ———— Protest waived. The Union Loan & Trust Company, E. R. Smith, Sec'y & Treas.

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EXHIBIT "B."

Schedule or list of Notes sued on.

NAME	Address	Amt.	Date	When Due
CONNECTICUT.				
			1893	1893
Cent. Natl. Bank	Middletown	5,000	2/1	9/2
			1892	
Meriden Natl. Bank	Meriden	5,000	12/26	7/10
INDIANA				
			1892	1893
Stone City Bank	Bedford	5,000	10/25	5/15
Bank of Charleston	Charleston	5,000	3/28/93	9/28
Elkhart Natl. Bank	Elkhart	5,000	2/21/93	8/3
			1892	
First Natl. Bank	Greencastle	5,000	10/24	5/2
			1893	
James M. Fowler	Lafayette	5,000	2/1	8.26
			1892	
First Natl. Bank	South Bend	5,000	10/24	5/3
South Bend Natl. Bank	South Bend	5,000	12/5	6/19
ILLINOIS.				
			1892	1893
Alpha State Bank	Alpha	2,500	10/25	5/6
			1893	
Farmers Natl. Bank	Geneseo	5,000	2/1	8/21
First Natl. Bank	Kewanee	5,000	2/1	8/23
First Natl. Bank	Kewanee	5,000	1/13	7/26
			1892	
Andrew Oliver	Kewanee	2,500	12/5	6/1
			1893	
George Armstrong	Kewanee	5,000	3/28	9/30
First Natl. Bank	Quincy	5,000	2/1	8/16
			1892	
First Natl. Bank	Sterling	5,000	10/24	4/28
			1893	
First Natl. Bank	Batavia	5,000	2/1	8/11

IOWA

			1893	1893
Joseph Kelso	Bellvue	5,000	2/1	8/2
Iowa State Sav. Bank	Burlington	5,000	2/1	8/19
			1892	
Commercial State Bank	Marshalltown	2,500	10/25	5/5
Delaware Co. State Bank	Manchester	5,000	12;5	7/11
			1892	1893
Monona State Bank	Monona	2,500	12/5	6/1
			1893	
Muscatine Sav. Bank	Muscatine	5,000	2/1	8/15
Postville State Bank	Postville	5,000	2/1	8/10
Postville State Bank	Postville	2,500	2/6	8/10
F. W. Roberts	Postville	2,500	2/6	8/10

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MARYLAND

			1892	1893
Natl. Union Bank of Md	Baltimore	5,000	10/12	4/25
Natl. Union Bank of Md	Baltimore	5,000	2/1/93	8/28
			1892	
Garrett Co. Bank	Oakland	5,000	12/3	6/6
			1893	
Cecil Natl. Bank	Port Deposit	5,000	2/1	8/18
			1892	
Third Natl. Bank	Cumberland	5,000	10/24	5/6

MAINE

			1893	
Eastern Tr. & Bkg. Co	Bangor	5,000	2/1	8/29
			1892	
Kenduskeag Natl. Bank	Bangor	5,000	12/26	7/6

MASSACHUSETTS

			1892	1893
Natl. Bank Comith	Boston	5,000	12/5	7/6
Freemans Natl. Bank	Boston	5,000	12/5	7/3
			1893	
Freemans Natl. Bank	Boston	5,000	2/1	8/12
			1893	
Wachusetts Natl. Bank	Fitchburg	5,000	1/13	7/17
			1892	
Wachusetts Natl. Bank	Fitchburg	5,000	12/26	7/11
			1893	
First Natl. Bank	Gerdner	5,000	2/1	9/4
			1892	
Merchants Natl. Bank	Lawerence	5,000	12/5	7/14
			1893	
Marblehead Natl. Bank	Marblehead	5,000	3/31	8/3
Argicltural Natl. Bank	Pittsfield	5,000	1/13	7/19
			1892	
Neaumkeag Natl. Bank	Salem	5,000	12/5	7/21
			1893	
Second Natl. Bank	Springfield	5,000	2/1	9/1
First Natl Bank	Webster	5,000	3/28	9/29
First Natl. Bank	Yarmouthport	5,000	1/13	7/18

MICHIGAN

			1893	1893
Baetke Fry & Co	Brighton	2,500	1/15	7/31
			1892	
B. S. Spofford	Coldwater	5,000	12/14	6/20
Branch Co. Sav. Bank	Coldwater	5,000	12/5	6/5
Coldwater Natl. Bank	Coldwater	5,000	12/26	7/5
Farmers State Bank	Concord	5,000	12/5	7/12

			1893	
First State Bank	Decatur	1,500	3/31	9/30
			1892	
First State Bank	Decatur	2 500	11/23	5/25
East Saginaw Sav. Bank	East Saginaw	5,000	12/3	6/5
			1893	
First Natl. Bank	Flint	5,000	2/1	9/7
			1892	
Port Huron Sav. Bank	Port Huron	5,000	11/17	5/17
			1893	
First Natl. Bank	Hillsdale	5,000	2/1	8/25

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MINNESOTA

			1892	
First Natl Bank	Rochester	5,000	12/14	6/13
First Natl. Bank	Owatonna	5,000	12/3	6/8

MISSOURI

			1893	1893
Natl. Bank of Rolla	Rolla	5,000	2/1	8/4
			1892	
Franklin Bank	St. Louis	5,000	10/24	5/4
Franklin Bank	St. Louis	5,000	10/24	5/5
Franklin Bank	St. Louis	5,000	12/5	7/1
			1893	
Laclede Natl. Bank	St. Louis	5,000	2/1	8/22
			1892	
Natl. Bank Republic	St. Louis	5,000	11/17	5/15
Natl. Bank Republic	St. Louis	5,000	11/17	5/16
			1893	
Third Natl. Bank	St. Louis	5,000	1/13	7/24

NEW HAMPSHIRE

			1892	
Louis Piper	Keene	1,000	11/23	5/25
			1893	
Louis Piper	Keene	2,000	1/5	7/10
Cheshire Natl. Bank	Keene	5,000	1/24	8/3
Cheshire Natl. Bank	Keene	1,000	2/25	9/8
O. G. Dort	Keene	2,500	2/1	8/23
			1892	
Second Natl. Bank	Nashua	5,000	10/13	4/26
			1893	1893
S. D. Chandler	Nashua	5,000	1/13	7/25
			1892	
Second Natl. Bank	Nashua	2,000	10/25	5/11
	Part of $5000, note held in joint account with Mechanics Sav. Bank.			
Mechanics Sav. Bank	Nashua	3,000	10/25	5/11
	Part of $5,000 note See 2nd Nat. Bank Nashua.			

NEW YORK

			1892	
Dye Bros.	Alleghany	5,000	10/25	5/6
First Natl. Bank	Andes	5,000	12/26	7/1
Hanover Natl. Bank	New York	5,000	12/5	6/6
Hanover Natl. Bank	New York	5,000	12/5	6/23
Hanover Natl. Bank	New York	5,000	12/5	6/24
			1893	
Hanover Natl. Bank	New York	5,000	3/2	6/5

			1892	
Natl. Bank of the Republic	New York	5,000	12/5	6/1
Natl. Bank of the Republic	New York	5,000	12/5	6/2
			1893	1893
North Granville Natl. Bank	North Granville	5,000	2/1	8/17
			1892	
Farmers' Natl. Bank	Rome	5,000	10/25	5/2
[97]				
First Natl. Bank	Rome	5,000	1/13	7/20
			1892	
Willis T. Hanson	Schenectday	5,000	10/25	5/10
Tarrytown Natl. Bank	Tarrytown	5,000	10/25	3/5
OHIO				
			1892	
Harrison Natl. Bank	Cadiz	5,000	10/25	5/10
Harrison Natl. Bank	Cadiz	5,000	12/5	7/20
			1893	
Third Natl. Bank	Circleville	5,000	2/1	9/13
Potters Natl Bank	East Liverpool	5,000	2/1	9/9
			1892	
First Natl. Bank	Flushing	2,000	10/25	5/5
			1893	
First Natl Bank	Flushing	5,000	3/17	9/20
			1892	
Vinton Co. Natl Bank	McArthur	5,000	12/5	7/9
			1893	
Exchange Bank	Madison	5,000	2/1	8/1
PENNSYLVANIA				
			1893	1893
Pomeroy Bros. & F. E. Smith	Blossburg	5,000	2/18	5/20
Citizens Natl Bank	Corry	5,000	2/1	8/8
			1892	
Second Natl Bank	Erie	5,000	12/5	7/7
First Natl. Bank	Greenville	5,000	12/26	7/7
Hazleton Natl. Bank	Hazleton	5,000	12/5	7/22
			1893	
Honesdale Natl. Bank	Honesdale	5,000	3/17	9/22
Jersey Shore Bkg Co.	Jersey Shore	5,000	3/28	10/3
Lockhaven Tr. & S. O. Co.	Lockhaven	5,000	1/24	8/3
			1892	
Miners Sav. Bank	Pittson	5,000	12/5	6/12
			1892	1893
First Natl Bank	Sharon	5,000	12/26	7/12
			1893	
First Natl. Bank	Sharon	5,000	2/1	9/6
First Natl. Bank	Sharon	5,000	3/17	9/21
Wyoming Natl Bank	Tunkhannock	5,000	2/15	10/14
Smyser Bott & Co	York	2,500	2/6	8/11
RHODE ISLAND				
			1892	
Weybossett Natl Bank	Providence	5,000	10/25	5/13
Natl Bank of Commerce	Providence	5,000	10/25	5/11
Natl. Bank of Commerce	Providence	5,000	10/25	5/12
Natl. Bank of Commerce	Providence	5,000	10/25	5/13
Natl. Bank of Commerce	Providence	5,000	2/1/93	8/5
Natl. Bank of Commerce	Providence	5,000	2/1	8/7
			1892	
City Natl. Bank	Providence	5,000	12/5	7/5
			1893	
Mechanics Sav. Bank	Providence	5,000	1/13	7/22

VERMONT				
			1892	
Natl. White River Bank	Bethel	5,000	11/30	5/31
			1893	
Natl. White River Bank	Bethel	5,000	1/24	8/2
			1892	1893
First Natl Bank	Montpelier	5,000	12/5	6/9
First Natl. Bank	Montpelier	5,000	12/5/92	6/10/93
[98]				
			1893	
First Natl Bank	Montpelier	5,000	2/1	8/30
First Natl. Bank	Montpelier	1,000	1/13	7/27
First Natl. Bank	Montpelier	2,500	2/24	8/28
			1892	
Mrs B. D. Denny.	Montpelier	2,000	12/10	6/15
			1893	
Randolph Natl. Bank	West Randolph	5,000	1/24	8/1
WISCONSIN				
			1892	1893
Bank of Brodhead	Brodhead	5,000	12/5	6/7
			1893	
Batavian Bank	LaCrosse	5,000	1/13	7/21
			1892	
State Bank of Plymouth	Plymouth	3,000	10/25	5/18
State Bank of Plymouth	Plymouth	3,000	11/18	5/20
			1893	
Shullsburg Bank	Shullsburg	2,500	2/23	8/28
D. L. Plumer	Wausau	5,000	2/1	8/24
Freemans Natl Bank	Boston Mass	5,000	12/5/92	7/8/93

In the District Court of Iowa in and for Woodbury County.

ANSWER.

Credits Commutation Company, Plaintiff,

vs.

Sioux City Terminal Railroad and Warehouse Company Defendants.

Now comes the defendant in the above entitled cause, The Sioux City Terminal Railroad & Warehouse Company, and for answer to petition of plaintiff herein,

Admits all the allegations in the petition contained, except as are hereinafter denied or otherwise answered;

And further answering defendant avers that as to whether or not the purchaser of said notes mentioned in said petitioner sold, assigned and delivered the same to the plaintiff for valuable consideration, and as to whether or not said Credits Commutation Company Plaintiff, is now the holder of all of said notes set out in said petition and whether or not there is now due and owing from defendants to said plaintiff the sum stated in said petition this defendant has neither knowledge, nor information sufficient to form belief.

WRIGHT, HUBBARD & BEVINGTON,
Attys. for S. C. Ter. R. R. & W. H. Co.

Filed July 23, 1895. W. S. Belden, Clerk; by Geo. M. Hoke, Dep.

99 In the District Court of Iowa in and for Woodbury County.

JUDGMENT.

Credits Commutation Company, Plaintiff,
vs.
Sioux City Terminal Railroad & Warehouse Company, Defendant.

And now, at this time, to wit the 23rd day of July, 1895 it being an adjourned session of the regular May 1895 Term of said Court, the above matter came on for hearing and final determination by consent of the parties made in open court, the plaintiff the Credits Commutation Company, appearing by its attorneys, Spalding Taylor & Burgess, and the defendant, the Sioux City Terminal Railroad & Warehouse Company appearing by its attorneys Wright Hubbard & Bevington, and thereupon the matter was submitted to the summary decision of the court, and the evidence offered and introduced in support of the issues joined between the parties being fully considered, and counsel for the respective parties having been fully heard, and the court being duly advised in the premises, after due deliberation, expressly finds that all the allegations of plaintiff's petition are true;

That plaintiff is the owner of all the notes of defendant in suit aggregating six hundred and sixteen thousand five hundred dollars ($616,500) in amount, with interest on said notes, amounting to seventy-five thousand five hundred ninety-six dollars and ninety-five cents ($75,596.95) that the indebtedness represented by said notes is a portion of the indebtedness represented by certain notes aggregating seven hundred and eighteen thousand dollars ($718,000) in amount of the said defendant for the benefit of the holders whereof, and its ten thousand dollar overdraft the said defendant made a certain conveyance in trust of its property in Sioux City, Iowa, to E. H. Hubbard, Trustee, dated December 23, 1893, which deed of conveyance was duly recorded in the public records of Woodbury County, Iowa, on December 23, 1893; that plaintiff is entitled to a judgment against the defendant for the full amount prayed in its petition with interest and costs, and that said judgment should be without prejudice to any rights or interests which the plaintiff may have as a holder of said notes under said deed of trust.

Now therefore, it is ordered and adjudged by the court, that the Credits Commutation Company have and recover of the defendant, the Sioux City Terminal Railroad & Warehouse Company, the sum of six hundred ninety-two thousand and

ninety-six dollars and ninety-five cents ($692,096.95) together with interest thereon at the rate of six per cent per annum from the date hereof and the costs of this action, taxed at twelve & 50/100 dollars ($12.50).

And it is further ordered and adjudged by the court that this judgment against the defendant shall be without prejudice or damage to any rights or interests which plaintiff may have as a holder of said notes under said trust deed.

GEO. W. WAKEFIELD,
District Judge.

Filed July 23, 1895. W. S. Belden, Clerk; by L. E. Lambert, Deputy.

100 GENERAL EXECUTION.

State of Iowa, to the Sheriff of Woodbury County—Greeting:

Whereas, on the 23rd day of July 1895, by the Judgment of the District Court of the State of Iowa, in and for Woodbury County held at the Court House in Sioux City in said County, Credits Commutation Company recovered against Sioux City Terminal Railroad and Warehouse Co. the sum of $692,096 95 dollars, debt, and the further sum of ———— dollars attorney's and $12.50 dollars cost, in a certain action then pending in said Court, wherein the said Credits Commutation Company was plaintiff, and the said Sioux City Terminal Railroad & Warehouse Company defendant, which said sums of money are still due; you are therefore commanded to cause to be made of the goods and chattels land and tenements of the said Sioux City Terminal Railroad & Warehouse Co., in your County subject to execution, the said sum of $692,096.95 dollars with interest thereon from the 23rd day of July 1895, at the rate of 6 per cent per annum and the further sum of ——— dollars attorneys fee, and the further sum of $12.50 dollars costs, together with all legal costs that may accrue by virtue of this writ; and have said moneys in our said court in seventy days from the date hereof to render the same unto the said Credits Commutation Company and have you then and there this writ, with your doings hereon.

Witness, my hand and the seal of said District Court hereto affixed, at Sioux City Iowa, in said County on this 26th day of July 1895.

[Seal] W. S. BELDEN, Clerk.
GEO. M. HOKE, Deputy.

Indorsed: No. 13674. General Execution District Court. Credits Commutation Company vs. The Sioux City Terminal

Railroad & Warehouse Company. Record 28, page 55. Judgment Docket H, page 119. Filed July 27, 1895. W. S. Belden, Clerk. T. E. Lambert, Deputy. Spalding, Taylor & Burgess, Attorneys.

(SHERIFF'S RETURN.)

State of Iowa,
Woodbury County—ss.

I W. C. Davenport Sheriff of said County do hereby certify and return that the within execution came into my hands on the 26th day of July 1895, and after diligent search I failed to find any property of the within named defendant in this County subject to execution.

W. C. DAVENPORT, Sheriff.
By E. S. JACKSON, Deputy.

Fees $2.10.

Received the within execution on the 26th day of July A. D. 1895, at 5 o'clock in the afternoon.

W. C. DAVENPORT, Sheriff.

101 State of Iowa,
County of Woodbury—ss.

I, W. S. Belden, Clerk of the District Court of the State of Iowa, in and for Woodbury County, hereby certify that the foregoing is a true and correct copy of the Petition, Answer, Judgment and General Execution, in cause entitled Credits Commutation Company Plaintiff, vs. Sioux City Terminal Railroad & Warehouse Company, defendant as full and complete as the same now appear on record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of August A. D. 1895.

[Seal]

W. S. BELDEN,
Clerk District Court.

State of Iowa,
Woodbury County—ss.

I, Geo. W. Wakefield, District Judge in and for the Fourth Judicial District of the State of Iowa, and one of the Presiding Judges of the District Court of the State of Iowa, in and for Woodbury County, do hereby certify that said District Court is a court of record having and exercising general original jurisdiction in civil, criminal, and probate proceedings; that W. S. Belden, Esq., who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court of the State of Iowa, in and for Woodbury County, in said District duly qualified as such, that his signature thereto is genu-

ine, that he is the proper custodian of the records and seal of said Court, and the proper official to give said certificate; that his said certificate is in due form of law and that to the transcript of the Record of said Court so certified and annexed to said certificate, full faith and credit and the same faith and credit as the original record are and ought to be given by law and usage in all the courts of the State of Iowa.

Witness my hand at Sioux City, Iowa, this 5th day of August 1895.

GEO. W. WAKEFIELD,

District Judge in and for Fourth Judicial District of the State of Iowa.

State of Iowa,
Woodbury County—ss.

I, W. S. Belden, Clerk of the District Court of Iowa, in and for the Woodbury County, do hereby certify that the Honorable Geo. W. Wakefield, who has given the [preceeding] certificate was at the time of so doing, a District Judge in and for the Fourth Judicial District of the State of Iowa, and the Presiding Judge of the District Court of said State in and for Woodbury County in said District, duly commissioned and sworn to all whose acts as such full faith and credit are and ought to be given.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux City Iowa, this 5th day of August A. D. 1895.

[Seal] W. S. BELDEN, Clerk.

(End of Exhibit A attached to Petition of Intervention.)

Indorsed: No. 13674. District Court of Iowa, Woodbury County. Credits Commutation Company, plaintiff, vs. Sioux City Terminal Railroad & Warehouse Company, defendant. Certified Transcript of Record. Spalding, Taylor & Burgess, Attorneys for plaintiff. Wright, Hubbard & Bevington, Attys. for defendant.

102 Indorsed: No. 142 Equity. In the Circuit Court of the United States, Northern District of Iowa, Western Division. First National Bank of Montpelier, Plff., vs. Sioux City Terminal Railroad & Warehouse Co., Deft.; Trust Co. of North America, Intervener and Complainant, vs. Sioux City Terminal Railroad & Warehouse Co., Deft. Petition of Intervention of Credits Commutation Company. Filed August 12th, 1895. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

John C. Coombs, Henry J. Taylor, Solicitors Credits Commutation Co.

103 Trust Company of North America

vs.

Sioux City Terminal Railroad & Warehouse Company et al.

The Trust Company of North America, at the trial offered on its own behalf the following evidence:

The Evidence of A. S. Garretson.

March 26, 1895, 2 o'clock P. M.

A. S. Garretson, of lawful age, a witness produced primarily on behalf of The Trust Company of North America, but with the privilege under the stipulation, of his evidence being used by any of the parties to this action, after being duly sworn by Mamie E. Brooks, Commissioner, testified as follows:

Examination.

Examined by A. F. Call, of Joy, Call & Joy.

Q. You are the President of the Sioux City Terminal Railroad & Warehouse Company?

A. Yes, sir.

Q. And from its inception or organization?

A. I think so.

Q. Did you have charge of its financial affairs as President?

A. Yes, sir.

Q. And did you personally look after the matter of the care of the property and attending to its financial operations?

A. Yes, sir.

Q. Did any one assist you in that work, or did you carry it along alone in behalf of the Company?

A. Mr. F. C. Hills assisted in the matter of filling in the lower yard and laying the tracks and securing the necessary city concessions etc. to the Company.

Q. Was he an officer of the company in any capacity or was he simply employed by you to look after that portion of the work?

A. I don't think Mr. Hills was an officer of the Company, but he had charge at that time of the operation of the Sioux City & Northern road and those improvements which he had charge of and the Terminal Company matters were very closely allied at that time.

Q. Did you have sole charge of the financial operations of the Company?

A. Yes, sir.

Q. You then had charge of the negotiations of the first mortgage bonds of the Company?

A. Yes, sir.

Q. You remember the time those bonds were issued on the property of the Company?

A. I don't remember exactly but I think it was 1890. Trust deed will show.

Q. Do you remember where the bonds were printed?

A. The bonds were printed in Philadelphia by the American Bank Note Company.

Q. Do you recollect where they were signed by the president and secretary?

104 A. At this moment I don't recall where those bonds were signed by Paullin and myself, whether here or Philadelphia. Paullin and I went to Philadelphia, on some business connected with those bonds, but at this moment, I don't know whether we executed them there or here.

Q. Do you remember of their being sent there to be certified by the Trustee?

A. Yes, they were certified by the Trustee.

Q. There?

A. There, yes, sir.

Q. Do you know if they were ever returned from there after being certified by the Trustee?

A. The business was with the bankers, Wright Bros. was the name and I don't remember whether we left them with Wright Bros. or not at that time.

Q. Did you ever know of their being returned here to Sioux City after being certified?

A. No, I don't remember of it.

Q. You never knew of their being hypothecated here?

A. No, those bonds were never hypothecated here.

Q. After being certified where were they left? In whose custody were they left?

A. My impression is that they were left with Wright Bros. & Co. who had the contract for the sale of the bonds.

Q. That is a firm of brokers in Philadelphia?

A. Yes, sir, Sidney L. Wright and—I have forgotten the other brother's name.

Q. It is a firm of brokers however, is it?

A. Yes, sir.

Q. And they are brokers in Philadelphia?

A. Yes, sir.

Q. And this firm of brokers had charge of the sale of the bonds?

A. Yes, sir.

Q. For you?

A. Yes, sir.

Q. And were the bonds actually sold by them?

A. Yes, sir.

Q. At what price?

A. The first lot of one million was sold at ninety and accrued interest, net.

Q. 90 cents on the dollar?

A. 90 cents on the dollar and accrued interest.

Q. And at what price were the remainder sold?

A. They paid ninety-five for two hundred and fifty thousand.

Q. Did the Company receive all of this, The Terminal Company receive the proceeds of the sale of those bonds at those prices?

A. Yes, sir.

Q. Were the funds and proceeds from the sale of the bonds all used in that business of the Company?

A. Yes, sir.

Q. Afterward and in March 1892, did you make a personal loan in Philadelphia to obtain funds to make the improvements on the Terminal property?

A. Yes, sir.

Q. And on what security did you obtain this loan?

A. There was two hundred and fifty thousand of the bonds not yet sold by Wright Bros., and they assisted me to get a loan in Philadelphia on those bonds, and I put up some bank stock 500 shares of the Sioux National Bank stock with them, and got a loan of $225,000. The avails of the loan was to be made available to my draft as the work progressed on the union depot and freight house.

105 Q. Do you know of whom this money was obtained? Who actually made the loan?

A. I think the money came from the Trust Company of North America, I think, I don't know, that it was their money, I never made inquiry as to that, but they signed the contracts and the money was forthcoming all right.

Q. You don't know who in fact did make the loan to you?

A. No, I don't.

Q. And you gave your individual notes for the loan, you say?

A. Yes, I gave notes for the loan.

Q. And the Sioux National Bank stock, that was your individual property?

A. Yes, sir.

Q. At the time of making that loan did you enter into any written contract with regard to the furnishing of the money and the way it should be used by you?

A. Yes, sir.

Q. You may examine this paper I now hand you and state whether that is the original contract?

A. Yes, sir, I have already examined it, yes, sir, that is the contract referred to.

Contract is marked Exhibit "38" M. E. B. and Mr. Call offers same in evidence with leave to substitute a copy and withdraw the original.

Q. And under that contract $225,000 was furnished to you?

A. Yes, sir.

Q. And do you know whether the checks drawn on that fund by yourself were drawn for the purposes provided in the contract?

A. Yes, sir.

Q. In making the improvements on the Terminal property?

A. The improvements on the two buildings, the union depot and the freight house.

Q. And were these checks in all instances accompanied by the vouchers provided for and estimates, architects estimates and vouchers?

A. Yes, sir.

Q. And do you know whether the funds so drawn were used for paying for the buildings?

Q. Do you know what amount of that fund was so used?

A. It was all used except a balance of about $6,000 I think.

Q. And for that balance you have given a check that has not yet been accepted.

A. Yes, sir, for that balance, I think I gave two orders, one to Poorbaugh, and one to the representatives of Wakefield, Gillette-Herzog Manufacturing Company.

Q. Those two last drafts however, did not have the necessary architect's estimates and statements attached to them, did they?

A. I believe not, there was some correspondence with reference to that at that time, at the time the drafts were given, and I guess they have never been paid; however, at the time they were given to the parties, I explained to them that they were irregular in a measure and subject to refusal by the Trust Company of North America.

Q. And aside from those two checks which you mention, you say it is all drawn, with the exception of about $6,000?

A. Yes, sir.

Q. And how was this loan taken up $225,000?

A. Wright Bros. sold the bonds for ninety-five.

106 Q. Did you have charge of the matter of making contracts with the various people who erected buildings and other improvements on the Terminal grounds?

A. Yes, sir.

Q. In making contracts with these people or any of them, did you ever make any arrangements or agreements or contract with them that any of these bonds should be deposited for their security in any place?

A. No, sir.

Q. Did you ever have any conversation with any of them on the subject?

A. Nothing further than I think I told Wakefield that the money was provided for, that we had sold our bonds; that is all, that is before the work was commenced.

Q. Did you ever make any deposit of bonds or money or other securities for the purposes of securing these contractors on buildings?

A. No, sir.

Q. Do you know that the full $1,250,000 of bonds have all been sold?

A. Yes, sir.

Q. And do you know that they are all now outstanding and unpaid?

A. Yes, sir.

Q. You were also an officer of the Union Loan & Trust Company?

A. Yes, sir.

Q. What office did you hold?

A. Vice President.

Q. And have general charge and oversight of its affairs?

A. Quite a good deal.

Q. You were then acquainted with the fact of taking this second mortgage of $750,000 on the Terminal property?

A. Yes, sir.

Q. State the fact as to whether or not that mortgage was taken as a second mortgage and subject to the prior mortgage of $1,250,000.

A. Yes, sir, it was a second mortgage.

Q. And this mortgage of $750,000 was taken as a second mortgage?

A. Yes, sir.

Q. How long have you lived in Sioux City, Mr. Garretson?

A. 20 years.

Q. And during that time have you been interested and dealing more or less in real estate?

A. Yes, sir.

Q. And railroads and other enterprises?

A. Somewhat.

Q. At the time of placing this $1,250,000 mortgage on the property of the Terminal Company in the fall of 1890, when you had got the properties bought up and consolidated, what did you regard as the value of the Terminal?

A. That property was worth two and a quarter million dollars.

Q. Without improvements?

A. Well, the improvements had been going along you know; at what date was this?

Q. At the time you sold the first million of bonds.

A. That covered,—the lower yard had been ironed at that time, I guess.

Q. And then what was it fairly worth in 1892, when you sold the balance of the bonds?

A. With the buildings and all completed, it was worth two and a half million dollars; couldn't be duplicated at that time for that amount of money for twice that amount of money, outside of itself, in the city.

107 Q. And what do you think it is worth to day on the market?

A. I don't know.

Q. Have you a judgment in the matter?

A. At this time, money is worth more than any other commodity, and I don't know how that property would compare with money.

Q. Would it be your judgment that the property could be sold for the amount of the first mortgage bonds?

A. That is about 50 cents on the dollar; other railroad property has probably shrunk more than 50 cents on the dollar since 1892, I don't know.

Q. Your idea would be that it would be doubtful whether it could be sold for that within a reasonable time?

A. It could not be sold now for its value, nothing like it.

Q. Do you recollect that during the construction of the Union depot building, that there were numerous and long delays in the completion?

A. Yes, the contractor failed to complete the building according to contract with reference to time.

Q. Did you look into the matter of the causes of these delays?

A. The reasons which he assigned were the fact of certain strikes in Pennsylvania where the iron came from, for the joists and for the train shed, etc., but more especially for the eye beams; the people at Minneapolis who manufactured the eye beams claimed they were unable to get the material from the Carnegie Company, that that caused a very great delay with the stone work and the work connected with the building,

several months; all of which was greatly to the injury of the Terminal Company, although we were never in a position to get an adjustment of these matters troubles came on and we couldn't do it.

Q. Do you know at any time of the work being delayed for any length of time because of the failure of any of the other contractors of the Company to perform their part of the work?

A. There were but two contractors with reference to the Union depot, stone contractor, and—

Q. Do you know of any delay being caused by the stone contractor?

A. Not of my own knowledge, there was some little hitch between Wakefield and Poorbaugh later on, but I don't know just what the merits of the case were.

Q. Did you know in a general way of the work done, of the construction of the union depot being better than the plans and specifications called for?

A. No, we never had a case of that kind yet, in construction matters; they done though a very good job; I don't think there is any criticism.

Q. Did you ever hear of a claim of five or six thousand dollars for doing the painting job better than the specifications?

A. No, sir, I don't remember of any such claim.

Q. At one time in the history of these proceedings you made some kind of a settlement or adjustment with the contractor Wakefield?

A. Yes, sir.

Q. And who conducted that negotiation on the part of Wakefield?

A. That settlement was made after the troubles came on here, and it was largely in justice to local creditors of Wakefield's whose claims against him were just, but I don't understand that it in anywise affects these first mortgage bondholders, but it was a measure more particularly of fair treatment to these local creditors of Wakefield's and the question of policy as to what is the best thing to do in view of the
108 fact that the second mortgage bondholders represented by the Credits people were going to ask favors, bridge tax, and so on and so ought to make a settlement with them; there was not any negotiations carried on particularly by counsel.

Q. So the object and purpose of this settlement was to protect these lien holders as against that second mortgage that had gone on there rather unexpectedly?

A. Yes, very largely.

Q. At that time did you look into the merit of the question?

A. I didn't prove them, no sir, I didn't prove them, but I knew a great many of the creditors were in fact creditors of Wakefield, but I didn't prove their accounts, I didn't have any means of doing it at that time.

Q. And wasn't it, at the time of the settlement, wasn't it talked that this wouldn't affect the claim of the first mortgage bondholders?

A. This is my understanding.

Q. And you didn't go into the matter at the time, as to how much was actually due him on the contract?

A. Not in detail, no, sir.

Q. But it wasn't for the purpose of adjusting with him that you made the settlement?

A. I am not prepared to say that; I am prepared to say this that I was desirous of protecting the local creditors of Wakefield, and believing that in protecting them, that it would ultimately come out of the second mortgage bondholders and the second mortgage bondholders would be the people who would be interested in the construction of the bridge and other things here and they could well afford to have this thing straightened in order to secure the support of all these people in that matter.

Q. And about the time of making this settlement, you advised the Trust Company of North America of the fact, didn't you?

A. I think I did.

Q. And also at the same time and in the same letter that you had been assured by Wakefield's counsel that it would not affect their rights in any way?

A. I may have, I don't remember as to that in detail.

Q. In planning these buildings, union depot especially do you recollect when you finally settled upon the present location?

A. I think it was probably as late as 1891, and possibly as late as 1892.

Q. Where was the original idea of a location?

A. From Jackson street west, Jackson and Third west.

Q. And you had a different style of building under contemplation for that location did you not?

A. Yes, sir; when we were figuring down there, it was at the time the New York people were pushing the road in Nebraska, if I remember rightly, and we were figuring then that we were to provide facilities for their road, the Sioux City & Northern and the Great Northern only, at that early time, about '90 or '89. And the plans were changed after we had changed the location and had talked with the Milwaukee people and Omaha people and the Northwestern people; they

couldn't get into it down there on account of the freight yards of the Milwaukee road; Hedges wanted the depot located at Jackson street.

Q. Before inaugurating this enterprise of planning the Terminal properties here and facilities here, did you make some investigation or have some investigation made in other cities as to how these properties were handled?

109 A. Yes, sir.

Q. How extensive an investigation did you have made?

A. St. Paul and Minneapolis quite thoroughly, Chicago partially Harrisburg partially and Philadelphia somewhat.

Q. Omaha and Kansas City to any extent?

A. Omaha hasn't got much that way, they are cramped considerable that way; since our Company was organized, a Terminal Company has been organized at Omaha and a system of tracks prepared and a bridge built too, but at that time Omaha was cramped a good deal.

Q. So you, from your investigation became considerably acquainted with the enterprises of furnishing Terminal facilities to roads?

A. Yes, sir.

Q. Now do you know whether or not a union depot in connection with the trackage system is a usual thing or not, or whether it is the exceptional thing or not? A Union depot in connection with Terminal facilities and trackage system, is it a usual thing or exceptional thing?

A. Well, as I run it over in my mind, I am inclined to think that the union depot probably is very often provided without yards, without terminal yards in connection therewith; I think the St. Paul union depot is a separate property from the Terminal Company; and I think that is so in Minneapolis I don't understand that there is anything in the situation that might be exceptional or that might be absolutely necessary; might have a union depot and might not have one in connection with terminal facilities.

Q. Some systems provide a union depot and some systems simply provide track facilities?

A. Yes, sir, I think that is right; it might be built or it might not; I think at Omaha there is no union depot in connection with the terminal yard; it is located in another place, not yet completed.

Cross-Examination.

Cross-examined by H. J. Taylor, of Spalding, Taylor & Burgess.

Q. Do you recollect the fact of J. O'Donovan Rossa working for the Terminal Company in connection with the sale and re-

moval of buildings from the Terminal grounds in January 1890?

A. Rossa had charge of some rent collections and removing of some buildings at—I have forgotten the dates.

Q. The Terminal Company engaged him to do that work.

A. I went to Rossa and got him to do it.

Q. You were President of the Terminal Company?

A. Yes, sir.

Q. F. C. Hills was engaged by you as president of the Terminal Company to look after matters on the Terminal grounds?

A. Yes, sir, he was at work down there filling up the lower yards.

Q. Having tracks laid, and switches and side tracks?

A. Yes, sir.

Q. And also getting franchises from the city?

A. Yes, sir, he assisted in that matter.

Q. From the very inception of the Terminal Company, it was the intention and understanding that there should be a passenger depot erected somewhere upon the Terminal grounds, was it not, Mr. Garretson?

110 A. We anticipated putting in a passenger station, yes, sir.

Q. And the Trust Company of North America, at the time it took its trust deed and prior under the negotiations, knew that there was to be constructed on those Terminal Grounds a union depot?

Objected to by Mr. Call as incompetent and immaterial.

A. The negotiations for the trustee to act as trustee was carried on through Wright Bros. of Philadelphia, and they assumed the charge of the sale of the bonds, and I didn't come in contact with those people much until after the first million of bonds had been sold.

Q. The depot, station referred to in the trust dee-, this was a Union Depot, was it not?

A. They never had any thought of any depot for any other than union purposes.

A. I think that is right, but it is more especially in 1890, the figuring,—as I said before, we figured on the location dow a here for facilities for the Pacific and our own road and the Great Northern; at the time the Pacific Short Line was figuring on building the line on through, the negotiations with French and those people in New York was to provide facilities for their trains on this side, and it was to be a union depot, and I guess that is the idea, union for these two roads and nobody else, but negotia-

tions at that time had not been taken up with the Milwaukee or Chicago & Northwestern the Omaha and the Illinois Central, if I remember right.

Q. Had not there been some arrangement, some negotiations, some talks with the Illinois Central in connection with the union depot, had not the matter been canvassed by them as early as 1889?

A. It might have been, before figuring with Wright Bros. we figured with Mr. Harrigan,—Harriman that is the name, Harriman a banker, and I think vice president of the Illinois Central Railroad to finance this terminal property here. I think there was something of that kind done before I went to Philadelphia.

Q. And before the Trust Company of North America became trustee?

A. Yes, my negotiations with Harriman were before I went to Philadelphia.

Q. Then it was always expected that the depot that would be built would be open to other railroads upon contract terms with them if they saw fit to use it?

A. Certainly, there were no barriers placed against any roads coming in.

Q. Their use of the depot was desired?

A. Quite so.

Q. The articles of incorporation of the Terminal Company speak not only of the Terminal grounds but of building railroads out in three or four directions from Sioux City. I will ask if it was not from the very first contemplated that the passenger station should be used by several roads, especially, certainly for those two roads, the Sioux City & Northern and the Pacific?

A. Yes, especially for those two roads, that is quite right, and the Illinois Central had been talked to with reference to the matter of terminal facilities and depot facilities at the time the location was favored at Jackson Street, but after it became apparent that the Milwaukee road and the Northwestern and others could be gotten without much trouble, then the question of location was brought up and the plan changed and I have forgotten now just when that was, Mr. Hills might be able to tell you.

111 Q. Do you consider the depot as it is constructed unreasonably large or expensive for the use for which it was originally intended?

A. No sir, just the right thing, exactly.

Q. That is, the union depot as it is constructed and now exists, is not in your opinion unreasonably large or expen-

sive, based on the purposes and intention you had of using a passenger depot upon the Terminal grounds at the time that the Terminal Company was organized, say, and it was expected that at least those two roads that you speak of would use it at once?

A. Well, the union depot as built is a little bit larger depot than we originally planned; the depot is none too large for the railroad interests of Sioux City which can enter the depot without any inconvenience as now located and built.

Q. As a matter of fact it is not large enough, is it?

A. It does contemplate 60 feet additional on the train-shed and the closing up of Pierce Street, but it was thought best not to put that on; it is unsafe to operate the depot with Pierce Street open, absolutely unsafe.

Q. This railroad that you had in mind from here to the west, it would have been a very large railroad, would it not, would have needed a large depot?

A. Yes, sir.

Q. Would this have been any too large for its purposes?

A. No, sir.

Q. So that for the purposes you originally intended to use the Terminal grounds and passenger depot for, you don't regard this depot as unreasonably large or expensive?

A. Well, we had not contemplated building quite as fine a depot at the Jackson Street location; I have forgotten what the sketches did show down there.

Q. There was then, from the organization of the Company, a plan for a union depot somewhere on the Terminal grounds?

A. Loft made some sketches of the depot for the Company.

Q. You had these at the organization of the Terminal Company?

A. Later.

Q. How much later?

A. I don't just recollect.

Q. Are those the ones Mr. Hills had?

A. He had the track plan; the track plan was prepared by J. C. Clark and approved by the chief engineer of the Great Northern Road, Mr. Miller, I think it is.

Q. You don't remember when Loft died?

A. No sir.

Q. He is dead?

A. Sure pop.

Q. Now, Mr. Garretson, you say you don't remember whether the bonds were signed here or in Philadelphia. Isn't it a fact that at first, these million and a quarter Terminal bonds were placed as security with the Union Loan & Trust

Company, and then later taken to Philadelphia for a while at least, and were there left with the Trust Company of North America?

A. Not that I know of.

Q. These Terminal properties were properties of the railroad syndicate were they not?

A. Yes, sir.

Q. And the question of improving them and questions arising in regard to the conduct of the Company were talked over by the members of the railroad syndicate and determined upon by them?

A. Yes, sir.

Q. Isn't it a fact, Mr. Garretson, that all these corporations were really owned by the railroad syndicate were under their general management, and conducted and controlled by
112 the members of the railroad syndicate rather than by any specific persons that might have been put in as directors?

A. Yes sir.

Q. Isn't it a fact that for various reasons you might desire persons outside of the syndicate to take a share or two of stock and act as directors for instance of the Sioux City & Northern when you desired to make a contract?

A. I think that all the shares of the Sioux City & Northern were bought and paid for and were held by the respective owners that is my impression; I don't think that any stock was ever given away to any parties to enable them to act as directors.

Q. The railroad syndicate owned all the stock of the Sioux City & Northern except a very few qualifying shares?

A. Yes sir.

Q. And directors who may have held a qualifying share, were really subject in their conduct to the wishes and determinations of the railroad syndicate, were they not?

A. There was never any friction, if I remember right.

Q. The railroad syndicate was ultimately the authority in these matters in connection with these properties, was it not?

A. There was never any friction on the part of any boards that I remember of.

Q. Isn't it a fact that there were so many corporations organized by the railroad syndicate and owned substantially by the members of the railroad syndicate, that it was very difficult to remember who composed the different boards of directors oftentimes?

A. There was just the two railroad corporations, the Terminal Company and the Sioux City & Northern Company; later on we got into the road into Nebraska and the bridge,

but as late as '90 there were only two corporations, if I remember right.

Q. Could you name the directors of the Terminal Company?

A. Originally?

Q. Yes, down to the time that the railroad syndicate resigned?

A. I think there were only three if I remember right, in the Terminal Company; I think it was John Hornick—no it must have been five: John Hornick, Captain Gere, D. T. Hedges, Craig Wright and myself, I think were the directors of the Terminal Company.

Q. Now as to these bonds of the Terminal Company, one and a quarter million, I think, do you mean to say that they were your individual bonds Mr. Garretson?

A. The 250,000 of bonds?

Q. Yes, any of them.

A. I mean to say this, that the responsibility of financing the Terminal Company through was on my shoulders specifically and that the board of directors commissioned me to take these bonds and make a sale and carry on the improvements as planned and agreed upon by the board, which I did.

Q. You don't claim that those were really your bonds, the bonds of A. S. Garretson?

A. I claim this: that pursuant to the resolutions of the board of directors of the Terminal Company, I had exclusive charge of those bonds and sold them and applied the money to the payment of the Terminal Company's debts as far as it went and made the improvements contemplated.

Q. Then the bonds belonged to the Terminal Company, and the proceed of the bonds.

A. The Terminal Company got the proceeds of the bonds.

Q. You wouldn't have considered that you had a right to have taken the proceeds of those bonds and walk off with it just as with money that was your own?

113 A. No, sir.

Q. They really belonged to the Terminal Company?

A. I fancy they did.

Q. There isn't any doubt about that?

A. I don't know what the conditions of the minds of the people might be at that time, or did you mean myself?

Q. I am speaking now of your understanding of the fact of the ownership of the bonds. If you owned them, I want you to say so.

A. Just as I have stated.

Q. That is, that the bonds belonged to the Terminal Company and they gave you authority to dispose of them?

A. That would be the probable workings of the resolution, I think.

Q. Now, Mr. Garretson, as to those 250,000 of bonds that you said you put up with the Trust Company of North America, with your note; wasn't it the understanding at the time you gave that note that by the time the note matured, a sale of those bonds would be consummated and would take care of that note; wasn't that at least the expectation or understanding?

A. Wright Bros. assured me that they could sell the bonds, they had practically disposed of the million already, and said they could sell the bonds, but the Trust Company took an option on the bonds themselves at a certain price, money lenders at that time were getting big rates for money and money was very hard to get; and they took an option on these bonds which they thought would be to their advantage.

Q. Didn't it work out then as you expected namely, that these 250,000 of bonds would be sold and the proceeds take care of the note?

A. Wright Bros. had control of the bonds, and they told me when there they were sure they could make the sale, they did not guarantee it.

Q. That was the expectation when you gave the note?

A. Yes, sir. That was my expectation, that the bonds would be sold.

Q. These 250,000 of bonds, were bonds belonging to the Terminal Company and you were handling them as the bonds of the Terminal Company under that resolution?

A. I don't just know what the resolution is, but there was a resolution put through authorizing me to take these bonds and finance the Company through and I felt responsible to the Terminal Company for the faithful accounting for the values of those bonds, and did so account to them.

Q. The Trust Company of North America when it took this special deposit for the construction of the Union depot, understood and knew that that money was to be used in the construction of that union depot and perhaps the freight house?

A. Union depot and freight house yes sir, it was explained to them by Wright Bros. if I remember right.

Q. Where did you turn the proceeds of the sale of those bonds? At what place? You say the Terminal Company got it, how did it get it?

A. I guess they got it by draft, as work progressed and as material was bought and paid for.

Q. I mean the entire proceeds of the entire million and a quarter?

A. The books of the Terminal Company will show, at this moment I can't give the details, the 250,000 of bonds were paid out on architects estimates and paid as work progressed.

114 Q. They were set apart especially for the construction of the Union Depot and freight house, it was the understanding that all of those bonds could be used for nothing else?

A. That was the understanding between Wright Bros. and myself.

Q. And the Trust Company of North America?

A. No, they didn't know anything about these matters until I went there with the loan.

Q. But when the 250,000 were deposited with the Trust Company of North America, they understood that those bonds would by their proceeds secure the construction of the Union Depot?

A. Yes, sir.

Q. Isn't it a fact that some of the bonds were sold for instance to the Penn Mutual with that express understanding, that a sufficient amount of bonds would be held by the Trust Company of North America, to insure safely and absolutely the contemplated improvement of the Union Depot upon the Terminal grounds?

A. I don't know as to that; I didn't come in contact with the purchasers of the bonds.

Q. Were Wright Bros. acting for the Trust Company of North America do you know?

A. They were my bankers in this case.

Q. Brokers?

A. Well, yes, investment brokers.

Q. You knew then prior to the commencement of the Union Depot that there was something in the neighborhood of $250,000 with the Trust Company of North America to construct the Union Depot?

A. Yes, the money was provided before we commenced work.

Q. And you informed Mr. Wakefield of that fact?

A. I told Wakefield that we would pay by drafts on Philadelphia on the architect's estimates and that I had provided the money in Philadelphia to do it.

Q. You told him it was the Trust Company of North America in Philadelphia?

A. May have, I don't remember.

Q. That is the one place there was any money?

A. Yes, sir, growing out of those bonds.

Q. For that purpose?

A. Yes, sir.

Q. The Terminal Company was having its notes negotiated through the Union Loan & Trust Company as early as September 1889, was it not?

A. Probably, the books will show. I don't remember the dates.

Q. Those notes were now negotiated through the Union Loan & Trust Company, sold by the Union Loan & Trust Company for a commission?

A. They had eight per cent, I don't know what they sold them at.

Q. Whatever they sold them at, the difference between that and eight per cent. would be their commission?

A. Yes, sir.

Q. Those notes were negotiated to different parties, mainly bankers throughout the country?

A. Yes, sir.

Q. Do you recollect as to the proceeds of notes of the Terminal Company negotiated through the Union Loan & Trust Company going to the credit of John Hornick, trustee, railroad syndicate account?

A. I don't know how they kept their account up
115 there; our books, the Terminal Company books will show how it was applied.

Q. Now, Mr. Garretson, take for instance 1889 and 1890 before the passenger depot was built, was there a lease of the Terminal properties to the Sioux City & Northern Railroad?

A. Yes, sir.

Q. Of all the property that the Terminal Company owned?

A. Yes, sir.

Q. The Terminal Company didn't own any property other than this Terminal property that is claimed as security by the Trust Company of North America, did it?

A. I guess not.

Q. Wasn't interest on these bonds or a portion of these million and a quarter bonds paid by the sale of some of the bonds at first before the Sioux City & Northern was able to meet that?

A. Yes, sir.

Q. About how many bonds were so used?

A. My recollection is that it was $125,000 I may be mistaken.

Q. Proceeds of that many bonds you think were used to pay interest upon prior bonds that had been sold?

A. Yes, sir, until the Sioux City & Northern was completed up in good shape and its business established.

Q. Now, Mr. Garretson, isn't it a fact that in 1893, some time along in the spring of 1893, you checked out of this special deposit fund that we have been speaking of for the construction of the union depot, a considerable sum of money and used it in paying interest account?

A. Out of the $225,000?

Q. Yes, sir.

A. No, sir.

Q. Isn't it a fact that proceeds of some of these Terminal bonds were used to pay interest on the Sioux City and Northern bonds?

A. No, sir.

Q. Is it not a fact, Mr. Garretson, that upon this very fund that you have been speaking of as with the Trust Company of North America, for the purposes of constructing the union depot that you drew on that fund for $18,000 or more and used the same to pay interest on the Sioux City & Northern bonds?

A. No.

Q. Didn't you draw about $18,000 from this special deposit fund from the Trust Company of North America for the construction of the Union Depot and have the same applied to the interest upon the Terminal bonds in 1893?

A. I don't remember of any such draft The Sioux City & Northern Company advanced the money to those contractors before we got the architect's certificate to reimburse the Sioux City & Northern Company and it is in connection with some such transaction as that that you must have in mind; I know of nothing else and the books of the Terminal Company will show all those transactions.

Q. You spoke of giving a check to the Gillette-Herzog Manufacturing Company upon the Trust Company of North America for certain amounts; the Gilette-Herzog Manufacturing Company had brought suit against the Terminal Company and garnished the Trust Company of North America?

A. I think so.

Q. That is what you were told by parties acting for the Gilette-Herzog Manufacturing Company?

A. Yes, sir.

Q. And they thought they would gain something if they had this check or draft from you upon the Trust Company of North America if coming up upon their accepted order?

116 A. Herzog was pressing Wakefield hard, and Wakefield was desirous of having them paid, all that could be paid.

Q. I am asking, Mr. Garretson, what use did you understand Gillette-Herzog Manufacturing Company was going to make of this draft? Didn't you understand they were going to try to get the money from the Trust Company of North America?

A. Yes.

Q. That is what they wanted it for?

A. I guess that's right; I can't imagine anything else.

Q. You were a member of the railroad syndicate so called?

A. Yes, sir.

Q. A partnership consisting of A. S. Garretson, D. T Hedges, John Hornick, James E. Booge, and Ed. Haakinson?

A. That is my understanding of it.

Q. And the Sioux City Terminal properties were a portion of the properties of the railroad syndicate properties?

A. Yes, sir.

Q. I will ask you if it was the understanding and arrangement that the bonds and stocks of the several railroad syndicate properties, such as the Terminal, should be security with the Union Loan & Trust Company for railroad syndicate paper negotiated by it to banks and bankers throughout the country to pay the railroad syndicate indebtedness?

A. The stock of the Sioux City & Northern Railroad Company had the equity in the Terminal property above the second mortgage bonds as the stock of the Terminal Company was owned by the Sioux City & Northern road.

Q. Even prior to the issuing of bonds of these corporations organized for and controlled by the railroad syndicate, such as the Terminal Company wasn't it understood that the bonds when issued, and probable before the bonds were issued, should stand as security for this railroad syndicate indebtedness through the Union Loan & Trust Company?

A. There are certain securities which were up for borrowed money at other places.

Q. I am speaking of before bonds were put up for borrowed money at other places.

A. I don't remember that the first mortgage bonds of the Terminal Company were put up for borrowed money at any time for the account of the syndicate.

Q. If they were at any time placed with the Union Loan & Trust Company, it would have been as collateral security to the railroad syndicate account, would it not?

A. I don't know, it might have been that; the Terminal Company I think always issued its own paper; I don't think it ever received any assistance by the individual names of anyone except myself. I don't know of any member of the syndicate that ever borrowed a dollar of money directly or indirectly except myself.

Q. You knew of the proceeds of the Terminal notes going to the credit of John Hornick, trustee?

A. No, I didn't.

Q. You don't say it wasn't so.

A. No I don't.

Q. Isn't it a fact, Mr. Garretson, that if the entire Terminal properties were put up and sold in the present market for cash, that they probably would not bring a million dollars cash?

A. Well, that is altogether possible.

Q. Isn't it probable in your best judgment? That that would be about the limit in the present market?

A. I presume that any block of property aggregat-
117 ing three million in 1890, situated on the Missouri River, would not sell for a million dollars cash if it sold for as much proportionately as it was sold for in Kansas City and Omaha.

Q. Then, to get an answer to the question, in your opinion, if the entire Terminal properties purporting to be covered by the trust deed to the Trust Company of North America, were put up and sold out at public auction they would probably not realize in cash to exceed a million dollars at the present time?

A. It is possible.

Q. Isn't it probable in your judgment?

A. I am inclined to think if the property was sold out and amply advertised and ample time given for its sale and all, it would bring more than a million.

Q. Would it bring as much as the indebtedness on these alleged bonds issued under the trust deed to the Trust Company of North America?

A. I should think so.

Q. You think it would bring as much as all that in cash?

A. Yes, sir.

Q. Do you know of anybody that wants to buy it on those terms?

A. I don't like to mention names.

Q. What is the income of the Terminal Company?

A. I don't know, I understand it isn't as much as it was formerly.

Q. And isn't it a fact in your judgment, Mr. Garretson, that if all the Terminal properties of this Sioux City Terminal Railroad & Warehouse Company were put up sold at public sale in Sioux City, at the present time that they wouldn't bring in cash more than the indebtedness represented by these million and a quarter bonds and interest?

A. It is quite probable that it would not.

Q. In regard to this note for $225,000 that you gave to the Trust Company of North America back of which were placed the two hundred and fifty thousand of bonds of the Terminal Company, didn't you have an agreement with the members of the railroad syndicate that whoever secured money upon their notes for purposes of railroad syndicate business, that they should be in effect notes of the railroad syndicate?

A. There was an agreement to that effect but the outline specified that such—

Q. What I want to get at is whether this note of yours was not a note made by you like John Hornick notes were made by him in pursuance of railroad syndicate purposes?

A. I had rather confine myself to the records of the Terminal Company and refer you to the resolution and the provisions of the resolution are not fresh in my mind at this time.

Q. As a matter of fact, didn't the other members of the syndicate get the same benefit from the giving of this note that you yourself got?

A. Yes I guess they did.

Re-direct Examination.

Re-examined by A. F. Call, of Joy, Call & Joy:

Q. Mr. Garretson, I will now hand you a bunch of letters under date of June 23 and 26 with reference to the transfer of funds from your personal account in Philadelphia, to the account of the Sioux City & Northern for payment of their account and state whether these letters are the original letters that passed at the time?

A. Yes, sir, they are the original letters to the best of my knowledge and belief.

118 Q. Being a letter under date of June 23, 1893, of George Walter Oakley, and addressed to Mr. Garretson as president, certifying disbursements with the indorsement of E. C. Wakefield as contractor that the disbursements were made on his account, which has already been offered in evidence as Exhibit "15". And also a letter from George Walter Oakley to Mr. Garretson, as president, dated June 23, 1893, certifying to the further amount of $5768.24, with the certificate of Wright, Hubbard & Yeomans, as attorneys under date of June 26, 1893, that the sum of $20,600.01 had been expended by the Sioux City & Northern. And also a letter of similar effect, on the same date to the Trust Company of North America by Wright, Hubbard & Yeomans, and a letter from Mr. Garretson to the Trust Company of North America, enclosing vouchers and certificate of architect, and authorizing the transfer of funds from his account to the account of the Sioux City & Northern. We will have the Exhibits identified which have now been marked Exhibits "40," "41," "42," and "43" and offer them in evidence.

Exhibits "40," "41," "42" and "43" are offered in evidence; Mr. Taylor objects to Exhibit "15" C. C. H. as irrelevant, immaterial and incompetent, and not the best evidence, and not binding upon the parties defendant, to the petition of the Trust Company of North America. Mr. Taylor makes the same objection to Exhibit "40" M. E. B. Mr. Taylor makes the same

objection to Exhibit 41 M. E. B. Mr. Taylor makes the same objection to Exhibit "42" M. E. B. Mr. Taylor makes the same objection to Exhibit "43" M. E. B.

Q. In connection with this Mr. Garretson you drew your check for the amount there indicated, did you?

A. Yes, sir.

Q. And that was attached to the architects certificate in regular form and the vouchers, was it?

A. The vouchers at any rate, and I presume the architect's certificate.

Q. From the examination of these letters, you now recollect the deal do you?

A. Yes, sir; it was a case where the Sioux City & Northern advanced the money to carry on the construction of the Union Depot, up to the amount of $20,000 and the Sioux City & Northern was indebted to the Trust Company of North America and I paid the Sioux City & Northern Company for the advances they had made the depot company getting the draft on account of their interest to apply for the account of their rent.

Q. You gave them a regular check accompanied by vouchers to cover their disbursements on depot account and then authorized it credited on your account on rent account?

A. Yes, sir.

Q. And that was simply done to avoid the expense of sending the money back and forth?

A. Yes sir.

Q. But it was money expended on depot account the same as other vouchers?

A. Yes sir.

119 Testimony of A. S. Garretson, taken on behalf of Trust Company of North America, on April 4th, 1895.

A. S. Garretson, being recalled in behalf of the Trust Company of North America and having been previously sworn in this case, testified as follows:

Direct Examination

By Mr. A. F. Call:

Q. Mr. Garretson will you examine this minute book kept by the Sioux City Terminal Railroad & Warehouse Company, and state whether that is the minute book kept by the company of its meetings?

A. Yes, sir.

Q. Will you turn to page seventy of the book, and state whether this meeting was held on June 28th, 1890 as therein shown?

A. Yes sir.

Q. And state whether the resolution as it appears on that page was adopted by the Board of Directors under date of June 30?

A. Yes sir.

Q. We will offer in evidence these resolutions that were adopted on the 30th day of June 1890, and ask that the commissioner make a copy and have it marked Exhibit 44.

Q. Mr. Garretson under the contract that you made with the Trust Company of North America, under which you borrowed two hundred twenty-five thousand dollars, and pledged as collateral two hundred fifty thousand dollars of the bonds of the company, I believe you testified that you afterwards elected to sell the collateral as provided by the contract.

A. I testified that I elected to buy back the collateral or rather to exercise my right to call the collateral away from the trust company that had made the loan.

Q. Will you examine this paper dated December 10th, and state whether that is the written election that you made at the time and furnished to the Trust Company?

A. Yes sir.

Said paper is marked Exhibit 45, and offered in evidence.

Q. Mr. Garretson at the time that you entered into the written contract with E. C. Wakefield for building the Union Depot, did you have any arrangement or contract or agreement with him that you would modify the specifications so as to lessen the cost of construction.

A. The contract had a provision in it providing for certain changes that might be made in the building as the work progressed and that where any material and labor was left out, there should be a reduction for that material and labor, and where additional labor and material was used and performed, there should be an extra amount paid therefor in proportion to the whole; that was the only contract that was made, that was the contract.

Q. And that is contained in the written agreement?

A. Yes sir.

Q. But outside of the written agreement, was there any oral contract that you would waive the specifications or modify them in any way or eliminate features of the building which would lessen the cost?

A. No, sir.

Q. Mr. Wakefield claims that you made an oral contract with him that if he would sign the original contract you would so modify the building as to lessen the cost twenty thousand dollars.

120 A. He is mistaken.

Q. Is that true?

A. No sir.

Q. You made no such agreement as that?

A. No sir.

Q. And the only agreement that you made with reference to modifications is the agreement embraced in the original written contract, then?

A. Yes sir, certainly.

Cross-Examination

By Mr. H. J. Taylor:

Q. How long before the contract as signed was Mr. Wakefield working on this Union depot.

A. I don't think that he had commenced to work until the contracts were executed.

Q. Are you positive as to that?

A. That is my impression.

Q. Isn't it a fact that he was working nearly a month before the contracts were executed so far as their execution in writing is concerned?

A. Not to my knowledge, I don't remember any such condition as that.

Q. Will you swear that he was not?

A. I would swear to the best of my knowledge and belief that he was not, but the books of the Terminal Company and the Sioux City & Northern Company will show just when the work was commenced on the depot, and the date of the contract will show just when the contract was executed. I will refer you to those.

Q. Wakefield's first bid on the specifications was very much higher than the amount stated in the contract wasn't it?

A. I think that there was a modification, a slight modification which amounted to a few thousand dollars made in the plans between the time of his bid and the execution of the contract, and the amount set out in the contract.

Q. Do you remember when they were made in the specifications?

A. No, sir, I do not remember.

Q. They were not made by you?

A. The specifications were prepared by the architects.

Q. And the change if made, would be made by the people down at Kansas City, the architects.

A. They were here at the time that the contract was signed.

Q. Well the contract was made verbally before it was signed and Wakefield actually working under it for a month.

A. No my memory is that the architects were here from Kansas City, and that the bids were opened one evening late, in the office of the Sioux City & Northern Company, and that the contract was awarded to Wakefield and Poorbaugh that night.

Q. Is it not a fact that you or Mr. Hills considered with Mr. Wakefield the question of reducing the expenses by making reductions that you desired, and isn't it a fact that Mr. Hills wrote a letter to Mr. Wakefield on the matter of reducing the cost, and desired Mr. Wakefield—

A. The bids were opened late in the evening, and Wakefield's was the lowest by only a few thousand dollars, and the architects were in the city that day; Mr. Waddell was here I think that day from Kansas City he was in our office, and he had charge of the iron work on the building, the engineer, and we arranged with Wakefield for certain deductions which were embodied in the contract then immediately prepared; we
121 had this sliding agreement for certain things if left out, and I think it figured some fifteen thousand dollars; that is the deduction which should be taken from the contract and if in the course of the construction, anything was added to the building in the way of labor and material, that was to be paid for extra.

Q. At that time Mr. Wakefield had done no work upon the Union Depot?

A. No sir.

Q. And it was on that bid that you let it to Mr. Wakefield?

A. Yes sir.

Q. Now, isn't it a fact that Mr. Wakefield's first bid included all the stone work and that there were various changes made?

A. The contract was split up, and two contracts were recognized. The work was cut up; they sent in their figures, they were separate, so much for the stone work, and so much for the other work.

Q. Do you remember of the specifications being sent down to Kansas City to be changed.

A. No, sir; I don't remember that. Mr. F. C. Hills would know more about the details of those things than myself.

Q Well, you understand that the contract was let to Mr. Wakefield before he did any work there; was it before it was signed?

A. Why, certainly, he never did any work before he had the contract, he wouldn't have had any justification in doing it.

Q. Now do you mean that you repurchased those bonds Mr. Garretson, what do you mean by that?

[Q.] Why at the time that the loan was made, the Trust Company of North America insisted upon an option upon the bonds and a price which I think was ninety-five—I guess it was ninety-two, no ninety-five; they had an option upon the bonds at ninety-five subject to my right to the bonds by paying them a commission in lieu of their option, and the bankers that had the bonds in hand, Wright Brothers, said it would be a favor to them if I made a demand for the bonds; that they could

handle them to better advantage than ninety-five, hence I followed Wright Bros. instructions, and notified the trustee that I would demand the bond and pay them the commission that was notified under the contract.

Q. Then you deposited money with the Trust Company of North America after that was it?

A. I gave them notice and then I had time to fulfill, between that time and the dates of the maturity of the notes. In the mean time the firm of Wright Brothers had sold the bonds and paid the notes.

Q. But you claim that this money that was owned there with the Trust Company of North America, $225,000.00 or whatever amount it was, was your money?

A. Subject to my contract to put it into the union depot and freight house.

Q. Your personal money.

A. Well, my obligation to the Terminal Company made it necessary to have it so applied, and they understood that.

Q. The Trust Company of North America understood that?

A. Yes, sir, the fact that the architects estimates of the work done, and the receipts of the contractor to the drafts that were drawn against that money, would show that.

Witness excused.

122 Exhibits referred to in the foregoing testimony of A. S. Garretson:

EXHIBIT "39" M. E. B.

Copy.

Agreement, in connection with loan of the sum of $225,000 made by the Trust Company of North America to A. S. Garretson of Sioux City, Iowa.

The Trust Company of North America agrees to place to the credit of A. S. Garretson the sum of $25,000 on the 15th day of March 1892, and a like sum of $25,000 upon the 15th day of each of the succeedings months of April, May, June, July, August, September, October, and November, which said moneys shall be subject to draft by the said A. S. Garretson when accompanied by the certificate of the architect under whose supervision the construction of the passenger station and freight house of The Sioux City Terminal Railroad and Warehouse Company is conducted to the effect that the amount of money for which the draft is presented does not exceed eight per cent of the cost of the buildings at the date of such draft and that all moneys theretofore drawn by the said A. S. Garretson from the Trust Company of North America, have been applied to the payment of the cost of construction of said buildings.

Said A. S. Garretson hereby agrees to pay the Trust Company of North America a commission of one per cent upon each sum of $25,000 at the time of its being placed to his credit with interest at the rate of six per cent per annum payable semi-annually on the 15th day of September 1892 and the 15th day of March 1893, and that he will repay the aggregate of said sums amounting to $225,000 on the said 15th day of March 1893, without defalcation.

The said A. S. Garretson hereby assigns and transfers to The Trust Company of North America all his right, title and interest to 250,000 dollars in the bonds of the said Sioux City Terminal Railroad and Warehouse Company now deposited with the said The Trust Company of North America (subject to certain agreements as to their sale) as collateral security for the said advance of 225,000 dollars in connection with 500 shares of the stock of the Sioux National Bank.

And the said A. S. Garretson further agrees that the said The Trust Company of North America shall have the option of purchasing the said 250,000 dollars of bonds of The Sioux City Terminal Railroad & Warehouse Company at a price of 925 dollars with accrued interest for every one thousand dollars of said bonds at any time prior to the 1st day of December 1892 subject however to the right of the said A. S. Garretson to repurchase the said 250,000 dollars of bonds at the price of 950 with accrued interest for each and every thousand dollars for a period of thirty days, after the exercise of the said option by the said Trust Company of North America payment for and delivery of said bonds in either case to be made at such time as said bonds are deliverable under the existing engagement as to their retention by the Trust Company of North America until the station and freight houses are completed.

123 Witness the seal of the said The Trust Company of North America and the hand and seal of the said A. S. Garretson this seventh day of March 1892, in duplicate.

THE TRUST COMPANY OF NORTH AMERICA.
JOHN CADWALADER, President.

Attest:

J. WALN VAUX, Secretary.

[Seal]

Witness, CHARLES HENRY JONES.

EXHIBIT "40" M. E. B.

Copy.

Sioux City, Iowa, June 23, 1893.

Mr. A. S. Garretson,
President:

Dear Sir: In addition to the amounts paid for material and labor to apply on the E. C. Wakefield contract, I have paid the following amounts for material etc., supplied for the Union Passenger Depot.

J. H. Queal & Co., plank for floor of train shed	$2795.98
VanBrunt & Howe, architect on account	500.00
Ed. Haakinson, gravel for ballasting tracks in train shed	2472.26
	$5768.24

Yours truly,
GEORGE WALTER OAKLEY, Treas.

EXHIBIT "41" M. E. B.

Copy.

Sioux City Iowa, June 26" 1893.

Trust Company of North America,
Philadelphia, Pa.

Gentlemen: We have examined the receipted bills and vouchers for money paid out by the Sioux City & Northern R. R. Co., on the Union Depot of the Sioux City Terminal Railroad & Warehouse Company and find that there has been expended in cash on said depot the sum of $20,600.01. We further state that the contractor E. C. Wakefield having been unable to finish the building, under the terms of the contract made between him and the Terminal Company and with his consent, the Terminal Company, through the Sioux City & Northern R. R. Company, took charge of the work and said payments have been made by the Sioux City & Northern R. R. Co., to the amount aforesaid.

Very respectfully,
WRIGHT, HUBBARD & YEOMANS.

(Dictated by W.)

124 EXHIBIT "42" M. E. B.

Copy.

Sioux City Iowa, June 26" 1893.

Trust Company of North America,
Philadelphia, Pa.

Gentlemen: We have examined the receipted bills and vouchers for money paid out by the Sioux City & Northern R.

R. Co. on the Union Depot of the Sioux City Terminal Railroad & Warehouse Company on the contract of E. C. Wakefield, contractor, and find that there has been expended in cash on said depot the sum of $20,600.01; we further state that the contractor E. C. Wakefield, having been unable to finish the building under the terms of the contract made between him and the Terminal Company, and with his consent, the Terminal Company, through the Sioux City & Northern R. R. Co., took charge of the work, and said payments have been made by said Sioux City & Northern R. R. Co., to the amount aforesaid on said depot to complete said building.

Yours respectfully,

WRIGHT, HUBBARD & YEOMANS.

(Dictated by W.)

EXHIBIT "43" M. E. B.

Copy.

Sioux City, Ia., June 26, 1893.

Charles Henry Jones, Esq.,
Vice-President Trust Co. of North America,
Philadelphia, Pa.

Dear Sir: In accordance with your letter of the 15th I enclose you herewith the following papers:

Draft on you for $18750.00, statement approved by E. C. Wakefield for certain amounts expended to apply on his contract for completing the Union Passenger depot; also (statement and) receipts for certain materials furnished in completing the train shed, which do not come under his contract; also statement from Wright Hubbard & Yeomans, our attorneys, certifying that we have made the payments as indicated on statements; also certificate from architect, Messrs. Van Brunt & Howe, certifying to the same fact.

These are all the documents called for in your letter of the 15th and I trust that everything is satisfactory to you.

As you understand, the enclosed draft for $18750.00 is a voucher for the transfer of funds to that extent from my account held by you to apply on the contract of the depot to the interest fund of the Sioux City Terminal Railroad & Warehouse Co. coupons due July 1st.

Kindly advise me of the receipt of these documents and oblige,

Yours very truly,

A. S. GARRETSON.

125 EXHIBIT "15" C. C. H.

Sioux City, Iowa, June 23, 1893.

Mr. A. S. Garretson,
President:

Dear Sir: Since the payment of the last estimate to E. C. Wakefield Contractor, the S. C. & N. R. R. Co. has expended on the Union Passenger Station the following amounts, which apply on the contract with E. C. Wakefield:

Pay Roll May 13th	$371.87	
Pay Roll May 20th	596.13	
Pay Roll May 27th	688.37	
Pay Roll June 3rd	671.85	
Pay Roll June 3rd	26.00	
Pay Roll June 10th	795.15	
Pay Roll June 17th	636.37	
		$3785.74
Beach & Weld, Hardware		75.15
Jas. D. Spalding, Lumber		206.25
L. Christianson, Cement Side Walk		1020.00
Coughlin & Sullivan, Plumbing		400.00
Herman & Savage on Vault Doors		54.00
W. H. Burns, Tin Roof		399.25
Jno. C. Kelly, Advt		.25
Carr Ryder & Engler Co., Mill stuff for Interior Finish		4351.75
Hornick, Hess & More, paints		531.45
Grant Breese & Co. Marble		3750.21
J. E. Hannan Drayage		4.50
McNiell & Powell, Insurance		225.00
S. C. Water Works		28.22
		$14831.77

Very truly yours,
GEORGE WALTER OAKLEY, Treas.

These payments were sanctioned by me, and are chargeable to my contract for the Union Passenger Depot.

E. C. WAKEFIELD, Contractor.

EXHIBIT 44.

Sioux City, Iowa, June 28, 1890.

The directors of this company met at the office of the President on the 30th day of June 1890, at 2:30 P. M. for the purpose of electing officers and transacting such other business

that might come before the meeting. Present: A. S. Garretson, T. P. Gere, and D. T. Hedges. On motion the board proceeded to the election [—] officers President A. S. Garretson, called to the chair, and D. T. Hedges elected secretary of the meeting. The board thereupon proceeded to said election, with the following result:

A. S. Garretson, President and Treasurer.
T. P. Gere, Vice-President.
D. T. Hedges, Secretary.

And said persons were declared elected directors until their successors are elected.

The following resolution was presented for consideration, and a motion made that it be adopted:

126 Resolved: That the Trust Company of North America, Philadelphia Trustees under the mortgage, made by this company dated January 1, 1890, be authorized and they are instructed to deliver the 1250 bonds of the denomination of $1000 each, secured by said mortgage to the order of A. S. Garretson, Esquire which resolution being duly seconded was adopted by the vote of all the directors

On motion duly seconded and carried A. S. Garretson, Esquire was authorized to sell and dispose of the bonds of this company on such terms as he may deem best.

A. S. GARRETSON, President.
D. T. HEDGES, Secretary.

EVIDENCE OF E. R. SMITH.

In the District Court of Iowa, in and for Woodbury County.

DEPOSITION OF E. R. SMITH.

Beach & Weld, Plaintiffs,

vs.

Sioux City Terminal Railroad & Warehouse Company, The Trust Company of North America, et al, Defendant.

Produced, sworn and examined at my office in the City and County of San Francisco, State of California, before me N. E. W. Smith, a notary public in and for said City and County of San Francisco, State of California, and the Commissioner duly appointed for that purpose by virtue of the annexed agreement, in a certain action now pending in the District Court in the State of Iowa, in and for Woodbury County, wherein Beach & Weld are plaintiffs, and the Sioux City Terminal Railroad & Warehouse Company, et al are defendants, on the part of any of the parties to said action, desiring to use the same.

Ernest R. Smith, of lawful age, being produced, sworn and examined on the part of the parties to said action, deposed as follows:

Interrogatory 1. What is your name, age, residence and occupation?

Answer to Interrogatory 1. My name is Ernest R. Smith, age thirty-four years, residence San Francisco, California; I have no occupation at this time.

Interrogatory 2. During what years were you a resident of Sioux City, Iowa.

Answer to Interrogatory 2. I resided in Sioux City Iowa something over twenty-five years, up to the time I left there, which was a year ago the 28th of last month.

Interrogatory 3. At the time of the assignment of the Union Loan & Trust Company for the benefit of creditors, on April 25, 1893, who was secretary of said company?

Answer to Interrogatory 3. I was.

Interrogatory 4. For how long continuously prior to the time of said assignment were you such secretary of the Union Loan & Trust Company?

Answer to Interrogatory 4. From the date of the organization of the Union Loan & Trust Company.

127 Interrogatory 5. You may state who kept the minutes of the metings of the stockholders and board of directors of said Union Loan & Trust Company, and who had, during that period, the custody and keeping of such official records?

Answer to Interrogatory 5. I kept the minutes of the meetings and had the custody of all records.

Interrogatory 6. Were you acquainted with the Sioux City Terminal Railroad and Warehouse Company, and its officers?

Answer to Interrogatory 6. I was.

Interrogatory 7. Who, if you know, was the President of said company?

Answer to Interrogatory 7. A. S. Garretson was president of the Sioux City Terminal Railroad & Warehouse Company.

Interrogatory 8. Did the Union Loan & Trust Company negotiate under its indorsement, any promissory notes of the Sioux City Terminal Railroad & Warehouse Company?

Answer to Interrogatory 8. It did.

Interrogatory 9. For so doing, what amount, if any, did said Union Loan & Trust Company receive?

Answer to Interrogatory 9. If I rightly understand the question, you mean to ask the amounts of commissions realized by the Union Loan & Trust Company as compensation for selling various and sundry notes of the Terminal Company.

It would be impossible for me to give the amount of such commissions, as I have no data before me with which to inform myself as to the amounts of those commissions; the commissions varied at different times, and with each individual note, owing to the fact that the notes were sold by the Union Loan & Trust Company to different bankers at different rates. The rate charged the Terminal Company was almost invariably eight per cent; the commission realized by the Union Loan & Trust Company would be the difference between the rate charged and the selling price; these transactions were made some time ago, and my memory is not accurate enough to allow me to give the amounts of these commissions as the transactions with the Terminal Company were very numerous.

Interrogatory 10. As such secretary of the Union Loan & Trust Company did you ever have in your possession and custody any bonds purporting to have been issued by the Sioux City Terminal Railroad & Warehouse Company?

Answer to Interrogatory 10. As secretary of the Union Loan & Trust Company, I believe that I did.

Interrogatory 11. What amount of bonds of said company did you so have in your possession?

Answer to Interrogatory 11. One million two hundred and fifty thousand dollars, par value.

Interrogatory 12. Were those the one million two hundred and fifty thousand dollars par value of bonds now sought to be foreclosed in this action by the Trust Company of North America?

Answer to Interrogatory 12. I presume they were, although I was not aware that such action had been commenced by the Trust Company of North America, no one having informed me of that fact, and as I am a long distance from the scene of action; it must be the same bonds however, as they are the only one million two hundred and fifty thousand dollar issue ever made by the Terminal Company, to my knowledge.

Interrogatory 13. At the time you, as secretary of the Union Loan & Trust Company, had said bonds in your possession and keeping, what amount of notes as near as you can state, of the Sioux City Terminal Railroad & Warehouse Company had been by you negotiated under the indorsement of the said Union Loan & Trust Company, and were then outstanding and unpaid?

Answer to Interrogatory 13. For the same reason given in my answer to Interrogatory 9, I am unable to answer definitely. I presume however, that the amount of notes
128 of the Terminal Company out under indorsement of the Union Loan & Trust Company at the time mentioned, was somewhere near the amount of the issue of bonds.

Interrogatory 14. You may state fully the understanding and agreement, and the purpose for which all the said bonds of the Sioux City Terminal Railroad & Warehouse Company had been thus deposited with the Union Loan & Trust Company, and with whom that arrangement and agreement was made and when?

Answer to Interrogatory 14. The Union Loan & Trust Company made an arrangement with the Terminal Company, whereby they were to make them (The Terminal Company) sundry advances from time to time, as the Terminal Company might need funds with which to pay for purchases of land; also to improve their property; for such advances, the Terminal Company agreed to deposit wth the Union Loan & Trust Company mortgage securities on the land just referred to; pursuant to this agreement, Mr. Garretson, president of the Terminal Company, deposited some one millon two hundred and fifty thousand dollars of first mortgage bonds issued by the Terminal Company secured on the property of the Terminal Company as collateral for advances made it and to be made by the Union Loan & Trust Company; these bonds were either delivered to Mr. Garretson Vice-president of the Union Loan & Trust Company, to be forwarded to the Trust Company of North America, or were sent to the Trust Company of North America direct by the Union Loan & Trust Company; I am unable to state at this time which was the case; Mr. Garretson, who was the president of the Terminal Company, gave myself, as Secretary of the Union Loan & Trust Company an order on the Trust Company of North America for the proceeds of the bonds before referred to as they were sold from time to time; it was fully understood by the Union Loan & Trust Company that these bonds were still practically in the possession of that company, although they were in the hands of the Trust Company of North America, by reason of the order before referred to, these bonds were sold from time to time, and the proceeds turned into the Union Loan & Trust Company by a draft made by Mr. Garretson on the Trust Company of North America, I do not recall the exact date on which this agreement was made, but it must have been about the time we first made the advances to the Terminal Company; the books of the Union Loan & Trust Company will show this.

Interrogatory 15. You may state whether or not the indebtedness of said Sioux City Terminal Railroad & Warehouse Company, from the time you first so received said bonds until the time of the assignment to E. H. Hubbard, assignee of said Union Loan & Trust Company, represented by notes of said Company so negotiated through the Union Loan & Trust Company with its indorsement, was a continuously increasing indebtedness; state the facts fully.

Answer to Interrogatory 15. It was a continuously increasing indebtedness, up to the time that the bonds of the Terminal Company were sold. If I remember rightly, after the entire issue of one million two hundred and fifty thousand dollars worth of bonds was sold the indebtedness of the Terminal Company was reduced very materially, as the proceeds of those bonds went to the retirement of the Terminal Company paper.

Interrogatory 16. What was the amount of the said indebtedness so represented by notes so negotiated through said Union Loan & Trust Company with its indorsement, outstanding and unpaid at the time of the assignment to the said Union Loan and Trust Company?

Answer to Interrogatory 16. Something over seven hundred thousand dollars.

Interrogatory 17. Who composed the Railroad Syndicate?

Answer to Interrogatory 17. A. S. Garretson, D. T. Hedges, John Hornick, Ed. Haakinson and James E. Booge.

129 Interrogatory 18. When was it organized and for what purpose?

Answer to Interrogatory 18. If I remember rightly, the railroad syndicate was organized during the early part of 1889, and for the purpose of constructing the Sioux City & Northern Railroad which ran from Sioux City to Garretson, and there connected with the Great Northern.

Interrogatory 19. What arrangement and agreement was entered into with the Union Loan & Trust Company by which said syndicate secured money for the acquisition, construction and equipment of its properties?

Answer to Interrogatory 19. The railroad syndicate, through Mr. Garretson, made an arrangement with the Union Loan & Trust Company to advance them the necessary funds with which to construct and equip their road, just referred to; these funds were to be raised upon various notes issued by certain members of the railroad syndicate, which paper or notes was to be secured by the stock and bonds of the railroad just mentioned; also by a certain contract or agreement which gave the Union Loan & Trust Company the benefit of the personal liability of all of the members of the railroad syndicate.

Interrogatory 20. What, in the understanding and agreement between the said railroad syndicate and the Union Loan & Trust Company, was the security to the Union Loan & Trust Company for its indorsement upon the notes negotiated by it on behalf and for said syndicate, and all substitutions and renewals thereof?

Answer to Interrogatory 20. As I have stated in my answer to the previous interrogatory, the stocks and bonds of the railroad property.

Interrogatory 21. Were the said bonds in controversy deposited with and held in pledge by the said Union Loan & Trust Company as collateral security for said railroad syndicate indebtedness to protect the said Union Loan & Trust Company on its indorsement and in behalf of the purchasers of said syndicate notes? State the facts fully.

Answer to Interrogatory 21. If you mean the Terminal bonds, no, as the Terminal business, and advances made to the Terminal Company were kept separate and distinct from what was known as the railroad syndicate property.

Interrogatory 22. About what was the amount of the said railroad syndicate indebtedness through the Union Loan & Trust Company at the time the said bonds of the Sioux City Terminal Railroad & Warehouse Company were so pledged with the said Union Loan & Trust Company, and you may state whether or not the said indebtedness was an increasing indebtedness continually from that time on until the assignment to E. H. Hubbard, and about what, if you know, was such railroad syndicate indebtedness through said Union Loan & Trust Company at the time of the assignment?

Answer to Interrogatory 22. I am unable to state the amount of the railroad syndicate indebtedness to the Union Loan & Trust Company at the time of the issuance of the bonds of the Terminal Company, as this transaction was some time ago and I have no data before me with which to refresh my memory; the bonds of the Terminal Company were not among the general collaterals which went to secure the railroad syndicate paper, although the stock of the Terminal Company was eventually owned by the Sioux City & Northern Railroad Company thus becoming the property of the railroad syndicate; all the transactions and business of the Terminal Company were kept separate and distinct from the business of the various railroad properties of the syndicate; the amount of railroad syndicate paper out at the time of the assignment of the Union Loan & Trust Company was about two million five hundred thousand dollars. The indebtedness was
130 an increasing one.

Interrogatory 23. You may state whether or not the said bonds in controversy to wit the one million two hundred and fifty thousand dollars of alleged bonds of the Sioux City Terminal Railroad & Warehouse Company were ever deposited in pledge with the Union Loan & Trust Company to protect its indorsement upon said syndicate paper, and in behalf of the purchasers of said syndicate notes; state the facts fully.

Answer to Interrogatory 23. The bonds of the Terminal Company were not deposited with the Union Loan & Trust Company to secure the paper or notes of the railroad syndicate, but were left with the Union Loan & Trust Company solely as collateral to the notes of the Terminal Company.

Interrogatory 24. Prior to so receiving said bonds on behalf of the said Union Loan & Trust Company what, if any, understanding and agreement was there in reference to the properties owned and controlled by said railroad syndicate, as to whether or not it was agreed said properties should be security for said indebtedness; state fully the agreement in that regard when and with whom made, and give the facts fully in connection therewith, to your own knowledge.

Answer to Interrogatory 24. I presume you refer to the bonds of the Sioux City Terminal Railroad & Warehouse Company and shall answer with that understanding; an agreement was made by the Terminal Company with the Union Loan & Trust Company as I have said before, to advance the Terminal Company various moneys; to secure these moneys, the Terminal Company deposited with the Union Loan & Trust Company certain bonds; these bonds were left with the Union Loan & Trust Company solely to secure the notes of the Terminal Company and were not considered by the Union Loan & Trust Company as being any part of what was known as the railroad syndicate notes; all arrangements on behalf of the Sioux City Terminal Railroad & Warehouse Company and on behalf of the railroad syndicate were made with the Union Loan and Trust Company by Mr. Garretson.

Interrogatory 25. You may state whether you were present at all meetings of the Board of Directors of the Union Loan & Trust Company.

Answer to Interrogatory 25. To my memory I was present at all such meetings.

Interrogatory 26. You may state whether you were present at all the meetings of the Stockholders or of the Directors of the Union Loan & Trust Company during the time that said bonds of the Sioux City Terminal Railroad & Warehouse Company were so held by the Union Loan & Trust Company.

Answer to Interrogatory 26. To my memory I was present at all such meetings.

Interrogatory 27. What, if any, action was taken at any Stockholders' or Directors' meeting authorizing the removal from the said Union Loan & Trust Co., under the agreements stated by you of the said bonds of the Sioux City Terminal Railroad & Warehouse Company, or any of them?

Answer to Interrogatory 27. No special action of the Directors or Stockholders of the Union Loan & Trust Company

was ever taken in that regard; the bonds of the Terminal Company were sent to the Trust Company of North America upon the instructions of Mr. A. S. Garretson Vice President of the Union Loan & Trust Company.

Interrogatory 28. State the circumstances and time, and at whose request, if any one, the said bonds were taken from said Union Loan & Trust Company.

Answer to Interrogatory 28. The bonds were sent to the Trust Company of North America either by Mr. Garretson himself, or by the Union Loan & Trust Company upon instructions given by Mr. Garretson with the understanding that the proceeds of said bonds were to be paid over to the Union
131 Loan & Trust Company upon their sale; I am unable to name the time, but I am of the opinion that the records of the Union Loan & Trust Company will show the date on which these bonds were shipped.

Interrogatory 29. Was such removal known or consented to by any of said purchasers of said railroad syndicate notes, or the notes of said Sioux City Terminal Railroad & Warehouse Company so negotiated through the Union Loan & Trust Company?

Answer to Interrogatory 29. The holders of the railroad syndicate notes had no interests in the Terminal Company bonds, and had no knowledge of their change of location; as the bonds were held by the Union Loan & Trust Company to protect themselves on the Terminal Company paper as against their indorsement, it was not deemed necessary by the Union Loan & Trust Company to inform the holders of the Terminal Company notes of the removal of said bonds from the office of the Union Loan & Trust Company to that of the Trust Company of North America, the Union Loan & Trust Company considering that it had full authority to make such change as it saw fit.

Interrogatory 30. State fully all the facts and circumstances connected with and the only authority for the removal of said bonds. State the fact fully.

Answer to Interrogatory 30. The bonds were removed or shipped entirely upon the authority and instruction of Mr. A. S. Garretson, Vice President of the Union Loan & Trust Company.

Interrogatory 31. At the time of the removal of said bonds, what, if any receipt or order was left with said Union Loan & Trust Company, and what has become of the same, if you know?

Answer to Interrogatory 31. At the time the bonds were sent to the Trust Company of North America, Mr. Garretson as president of the Terminal Company, gave the Union Loan

& Trust Company an order for the proceeds of the bonds referred to as they were sold, for which purpose they were sent to the Trust Company of North America.

Interrogatory 32. What Directors of the said Union Loan & Trust Company consented to or knew of the removal of said bonds from said Union Loan & Trust Company?

Answer to Interrogatory 32. Mr. Garretson and myself.

Interrogatory 33. What amount of the proceeds of any of the alleged sales of said bonds was ever received by the said Union Loan & Trust Company? State the facts fully.

Answer to Interrogatory 33. Approximately all; a portion of the funds however, did not come into the hands of the Union Loan and Trust Company, but were paid out by Mr. Garretson for the purchase of additional property acquired by the Terminal Company; I am unable to give you the amount of the funds received by the Union Loan and Trust Company from this source, as there were so many transactions concerning this and other business of the railroad syndicate that my memory does not permit me to give these figures, without any data before me with which to refresh my memory.

Interrogatory 34. What, if any, knowledge had the Trust Company of North America, that the said bonds had been so deposited as you have hereinbefore stated with the Union Loan & Trust Company?

Answer to Interrogatory 34. I do not know that they had any knowledge whatever of the fact of these bonds having been deposited with the Union Loan & Trust Company as security for various and sundry notes issued by the Terminal Company; neither do I know that they had any knowledge that any arrangement had been made by and between the Terminal Company and the Union Loan & Trust Company whereby the Trust Company was to make the Terminal Company these advances; they may have had that knowledge, but I have no means of knowing that they did.

Interrogatory 35. Were the said one million two hundred and fifty thousand dollars in amount of said bonds so received by the Union Loan & Trust Company all at one time or
132 at separate times and in different amounts? State the facts fully.

Answer to Interrogatory 35. I do not exactly understand this question, but presume you mean to ask whether the proceeds of these bonds were received by the Company at one time, if that is your meaning, I will say that the proceeds of those bonds were received at various times and in various amounts, by drafts made by Mr. Garretson on the Trust Company of North America, which drafts were made payable to the order of the Union Loan and Trust Company.

Interrogatory 36. What relationship do you bear to A. S. Garretson?

Answer to Interrogatory 26. I am his brother-in-law.

Interrogatory 37. Were the said bonds of the said Sioux City Terminal Railroad & Warehouse Company so deposited with the Union Loan & Trust Company as collateral security for the entire railroad syndicate indebtedness, as well as the notes of the Sioux City Terminal Railroad & Warehouse Company? State the facts fully if you know them.

Answer to Interrogatory 37. They were not, but were simply left with the Union Loan & Trust Company as security for the notes of the Terminal Company.

Interrogatory 38. You may state whether or not the agreement under which said railroad syndicate members associated themselves together in their said railroad and other enterprises, was at first in writing, and if said writing was left and deposited with said Union Loan & Trust Company?

Answer to Interrogatory 38. At the time the railroad syndicate was originally formed, an agreement in writing was made by them, and this writing was deposited with the Union Loan & Trust Company, and should be still among its papers.

Cross-Interrogatories.

Cross-Interrogatory 1. Do you testify that you had actual physical custody of any of the bonds secured by trust deed to the Trust Company of North America, after they were signed and certified? If so, during what period did you have them, from whom did you receive them, and to whom did you deliver them?

Answer to Cross-Interrogatory 1. I do not think the Terminal Company's bonds were ever in the hands of the Union Loan & Trust Company after they were certified, but were simply in the hands of the Union Loan & Trust Company prior to the certification, and were sent to the Trust Company of North America to have them so certified, and also for sale.

Cross-Interrogatory 2. If you say you had physical possession of the bonds, in whose interest did you hold them, and for what purpose, state fully?

Answer to Cross-Interrogatory 2. The Terminal Company bonds were in the hands of the Union Loan & Trust Company to secure the indebtedness of the Terminal Company; after their shipment to the Trust Company of North America, the Union Loan & Trust Company rested on an order given the Union Loan & Trust Company by Mr. Garretson on the Trust Company of North America, for the proceeds of said bonds as they might be sold from time to time, for their security in lieu of the bonds themselves.

Cross-Interrogatory 3. Who had general charge and control of the Union Loan & Trust Company over you?

Answer to Cross-Interrogatory 3. Mr. A. S. Garretson.

Cross-Interrogatory 4. Who had charge and conduct of the financial management of the railroad syndicate?

Answer to Cross-Interrogatory 4. Mr. A. S. Garretson.

Cross-Interrogatory 5. Who did the business for the syndicate and who had charge of their securities?

133 Answer to Cross-Interrogatory 5. A. S. Garretson.

Cross-Interrogatory 6. Who received the proceeds of the sale of the said bonds; and if you say the Union Loan & Trust Company to whose credit did the proceeds go?

Answer to Cross-Interrogatory 6. The Union Loan & Trust Company received practically all of the proceeds of the bonds of the Terminal Company; they received those funds by Mr. Garretson's giving them a draft on the Trust Company of North America, a portion of the proceeds of those bonds, however, never came into the hands of the Union Loan & Trust Company, but was paid out by Mr. Garretson for various debts incurred by the Terminal Company in the purchase of a portion of their lots or lands, and improving the same.

Cross-Interrogatory 7. For what purpose were the proceeds of these bonds used ultimately?

Answer to Cross-Interrogatory 7. That portion of the proceeds that came into the hands of the Union Loan & Trust Company went to the retirement of the notes of the Terminal Company.

Cross-Interrogatory 8. As a matter of fact, do you not know that the bonds never were in Sioux City for any purpose after they were signed and certified?

Answer to Cross-Interrogatory 8. I do not think they were ever in Sioux City after being certified.

(Signed) ERNEST R. SMITH.

Subscribed and sworn to before me this 2d day of April A. D. 1895.

[Seal] N. E. W. SMITH,

Notary Public in and for the City & County of San Francisco, State of California, and Commissioner herein.

EVIDENCE OF JOHN CADWALADER.

Deposition of witness taken at Philadelphia before Samuel T. Jaquett, a Notary Public of the Commonwealth of Pennsylvania, residing in the City of Philadelphia, in obedience to a Commission to take Deposition which issued from the Office of the Clerk of the District Court of Woodbury County, Iowa, on the first day of August 1894, to be read in a suit pending in the District Court of Woodbury County, wherein the said

Beach & Weld are plaintiffs and the said E. C. Wakefield et al are defendants.

Interrogatories propounded to and answered by John Cadwalader:

Interrogatory 1. State your name, age, place place of residence and occupation.

Answer. My name is John Cadwalader, my age is 51 years; I am an attorney at law and reside at No. 1519 Locust Street Philadelphia.

Interrogatory 2. What official position do you hold in the Trust Company of North America and how long have you held such position or been connected with said Company in an official way?

Answer. I am president of the Trust Company of North America and have held that position since the organization of the Company in 1889.

134 Interrogatory 3. If the Trust Company of North America is a corporation, when was it organized as such and under what law, and what are its powers with relation to the acceptance and execution of trusts?

Answer. The Trust Company of North America is a corporation organized under the general corporation law of Pennsylvania of 1874, by which law it is clothed with power to execute trusts of every character.

Interrogatory 4. Were you acquainted with the officers and managers of the Sioux City Terminal Railroad & Warehouse Company in the year 1890, or either of them, and if so how long have you known them?

Answer. I became acquainted with Mr. A. S. Garretson, the president of the Sioux City Terminal Railroad & Warehouse Company in 1890 and have known him since that time.

Interrogatory 5. State whether The Trust Company of North America accepted a trust deed from said Sioux City Terminal Railroad & Warehouse Company which was executed on the 1st day of January, 1890, on all of its property at Sioux City, Iowa, and if so will you produce a copy of the trust deed so accepted and have it identified and attached as a part of your deposition?

Answer. The Trust Company of North America accepted a trust under the Deed of Sioux City Terminal Railroad and Warehouse Company as stated in said Interrogatory a copy of that instrument is hereto attached. Marked Exhibit A.

Interrogatory 6. State if you know, whether the Trust Company of North America through its legally and regularly authorized officers certified the bonds secured by said trust deed; and if so, when were they certified and in what amount?

Answer All of the 1250 bonds were duly certified by me as President of the Trust Company of North America, at the same time at or about the time of receiving the bonds in the early part of 1890.

Interrogatory 7. After said bonds were certified, to whom were they delivered and for what purpose?

Answer. They were delivered under the order of the Sioux City Terminal Railroad and Warehouse Company of Sioux City Iowa, to A. S. Garretson.

Interrogatory 8. State if you know what amount of said bonds were sold on the market and are still outstanding and unpaid.

Answer. All of said bonds were sold and are still outstanding and unpaid.

Interrogatory 9. Since the issuance of said bonds what amount of coupons have been presented at or about each day of maturity for payment?

Answer. All were presented up to date of default.

Interrogatory 10: State whether the interest on said bonds maturing January 1, 1894 has been paid or whether funds have been deposited with the said Trust Company of North America for the payment of such interest.

Answer: No.

Interrogatory 11; What action has the Trust Company of North America taken with regard to such defaulted interest?

Answer; It has instituted proceedings to foreclose the mortgage.

Interrogatory 12; Has the interest maturing on said bonds on the 1st day of July 1894, been paid or have any funds been deposited with The Trust Company of North America to make such payment?

Answer: No.

Interrogatory 13; State whether any portion of the bonds secured by said trust deed were deposited or hypothecated with the Trust Company of North America as Trustee
135 for the bondholders for the purpose of paying for any improvements on the property covered by the trust deed.

Answer; No.

Interrogatory 14; Were any other securities or funds so hypothecated or deposited for any such purpose?

Answer; No.

Interrogatory 15; Did the Trust Company of North America ever undertake or agree to pay for any such improvements?

Answer; No.

Interrogatory 16; Has the Trust Company any bonds or securities or funds available for such purpose from any source?

Answer; No.

Interrogatory 17; Was there ever any agreement made by The Trust Company of North America that any bonds or funds or securities should be held for such purpose?

Answer; No agreement was ever made by the Trust Company of North America that any bonds or funds or securities should be applied to the construction of improvements on that property.

After all the bonds had been certified and sold an agreement was entered into between this Company as a proposed purchaser of a portion of the bonds and one other purchaser of the bonds and Mr. Garretson the owner of $250,000 of the bonds that they should be deposited with this Company to insure the building of the warehouses and station buildings which were proposed to be erected. This transaction was not made with the Sioux City Terminal Railroad and Warehouse Company, or in their interest; nor was it made with The Trust Company of North America as Trustee, nor in behalf of the main body of the bondholders; but was made with Mr. Garretson as an individual and for the benefit of The Trust Company as an individual purchaser, and one other purchaser, jointly with it.

Nearly two years after the deposit of these bonds this company and the other purchaser of the bonds, the warehouses and freight stations having been constructed, permitted Mr. Garretson to hypothecate the 250,000 bonds to secure money with which to build and construct the depot; this was a loan to Mr. Garretson individually upon his individual note, and other collateral, belonging to him personally was pledged with the Terminal bonds as additional security.

The proceeds of this loan were deposited in this Company to the credit of A. S. Garretson, and drafts were drawn by him upon that fund to meet payments to the Contractors for the construction of the depot, upon the certificates of the architects that the work had been duly performed and completed.

Interrogatory 18; State any other facts within your knowledge material to the case.

Answer; I think it right to state for the information of the Court the facts connected with an operation which has evidently led to a misconstruction;

An agreement was made by A. S. Garretson with two of the purchasers that he would not sell 250,000 of the bonds he

being the individual owner of them, until the depot and warehouses that were to be constructed were constructed and completed on this property and he deposited these bonds with us as a Bank and not as Trustee. There was no authority in us to sell these bonds or to secure money to apply to the construction of this building, or to hold them to meet any liabilties incurred in the construction of those buildings, but they were to remain as a guarantee of the good faith of his carrying out his projected enterprises. This transaction was long subsequent to the $1,250,000 mortgage which had been executed and delivered prior to any improvement of any kind on the premises by the mortgagor. This agreement was entirely in the interest of one other Bondholder in addition to this Com-
136 pany, and not for the bondholders generally who had no knowledge of the transaction and not as Trustee.

Cross Interrogatories propounded to and answered by John Cadwalader.

Cross [Interrogatories] 1; On what date did the Trust Company of North America actually receive and have delivered to it the trust deed from the Sioux City Terminal Railroad and Warehouse Company?

Answer; Prior to the 18th day of February 1890, when it was acknowledged.

Cross Interrogatory 2; On what date did the Trust Company of North America deliver the certified bonds secured by said trust deed, and to whom, and how many of said bonds?

Answer; I have no data that will enable me to answer this inter-ogatory.

Cross Interrogatory 3; Give the names and addresses of each of the present holders of any of said bonds, the number of bonds so held by each, the date of the purchase of said bonds in each case, and the amount paid for the same by each purchaser.

Answer; This information is not officially within my knowledge as the Company did not act as the agent for the sale of the bonds; they are all coupon bonds.

Cross Interrogatory 4; You may state who acted for the Sioux City Terminal Railroad & Warehouse Company and represented it in the matters connected with said trust deed of which your Company is trustee, and the bonds issued thereunder.

Answer; A. S. Garretson.

Cross Interrogatory 5; How long have you known A. S. Garretson of Sioux City, Iowa?

Answer; About five years.

Cross Interrogatory 6; How long have you known Sidney L. Wright of Philadelphia, Pennsylvania?

Answer; Over twenty years.

Cross Interrogatory 7; What commissions were paid in the sale of said bonds and by whom was the commission received?

Answer; This information is not within my knowledge.

Cross Interrogatory 8; How much money was actually received by the Sioux City Terminal Railroad & Warehouse Company out of the proceeds of the sale of said million and a quarter dollars of bonds?

Answer; I do not know.

Cross Interrogatory 9; How many of said bonds were issued for the purpose of raising money to pay interest upon other of said bonds already sold, and when were such bonds issued for such interest purpose?

Answer; The bonds were not issued by this Company and therefore I have no information relating to the purposes for which they were issued.

Cross Interrogatory 10; How many of said bonds were set aside to pay for the construction of the Union Depot & Train sheds upon said Terminal grounds in Sioux City Iowa, when were the same so set aside, and under what agreement in connection therewith?

Answer; No bonds were set aside to pay for the construction of the Union depot and train sheds upon said Terminal grounds that I know of.

Cross Interrogatory 11; If you say that two hundred and fifty thousand dollars of said bonds were set aside for Union Depot construction you may state whether all the proceeds of said bonds were issued for that purpose?

Answer; In reply to this Interrogatory I refer to my answers to the interrogatories in chief Nos. 17 & 18. As
137 I have just stated I do not know of the proceeds of any bonds being "issued" for "Union Depot construction."

Cross Interrogatory 12; You may attach to your answer a true copy and statement of the entire account of the said Trust Company of North America in connection with the said bonds and the sale and proceeds of the same, with either said Terminal Company, or A. S. Garretson or Sidney L. Wright, or any other party from the first entry up to the present time.

Answer; Such a statement cannot be made as no such account exists; the company as I have said, were not agents for the sale of the bonds.

Cross Interrogatory 13; You may state how much of the proceeds of said bonds has been used to pay interest upon bonds used under the said trust deed from said Terminal Com-

pany to said Trust Company of North America, and when such interest was paid, and for what period of time.

Answer; As this Company did not have any transactions with the Terminal Company as to sale of the bonds this question cannot be answered.

Cross Interrogatory 14; You may state when the Trust Company of North America first knew that E. C. Wakefield was principal contractor for the construction of the Union Depot and train shed, upon the property of said Terminal Company?

Answer; In the spring of 1892, the contract of E. C. Wakefield was sent to this Company by A. S. Garretson; this constitutes our only knowledge on the subject.

Cross Interrogatory -5; You may state what the agreement was as to the Trust Company of North America using the proceeds of said quarter of a million dollars of bonds so set apart for depot construction, to pay the contractors who were to construct said Union depot and train sheds?

Answer; The Trust Company of North America never had any agreement upon the subject.

Cross Interrogatory 16; What in amount were the proceeds of said two hundred and fifty thousand dollars of bonds so set apart for Union depot purposes?

Answer; No bonds being set apart for such purpose I cannot answer the question.

Cross Interrogatory 17; How much of the same was paid out for the benefit of the contractors in the construction of said Union depot and train sheds, and what were the methods and requirements of payment?

Answer; I refer to my answer to the 17th Interrogatory in chief as a reply to this cross interrogatory.

Cross Interrogatory 18; You may name all the parties known to the Trust Company of North America to have been engaged in the construction of said Union Depot and train sheds and when the Trust Company of North America first knew that each of said parties were so engaged in the construction of said improvements?

Answer; The names of E. C. Wakefield, The Sioux Valley Stone Company, and I think Hall appeared in contracts with him sent here in the spring of 1892, giving us the first knowledge upon the subject; these papers are in the possession of our counsel in Sioux City. In the summer of 1893, we were informed in connection with certain foreign attachments, that the Herzog-Gillette Manufacturing Company had also done some work upon this building.

Cross Interrogatory 19; You may state how much money the Trust Company of North America now has on hand from

the proceeds of the bonds of the Terminal Company, and for whose use and benefit do you claim to hold said money?

Answer; This Company has no money and never had on hand from the proceeds of the bonds of the Terminal
138 Company any moneys belonging to that Company.

Cross Interrogatory 20; Please attach copies of all correspondence on the part of the Trust Company of North America in connection with said trust deed and the bonds secured thereby, with either said Terminal Company or said A. S. Garretson or any other parties.

Answer; The business was conducted by personal interviews, and such correspondence as occur-ed was not in connection with this inquiry excepting the opinions of counsel upon titles.

Cross Interrogatory 21; Please attach a true copy of the lease of the property of said Terminal Company by the Sioux City & Nort-ern Railroad Company?

Answer; The Original lease referred to is not in the custody of this Company; a printed copy is attached marked Exhibit Aa.

Cross Interrogatory 22; State what and when payments upon said lease have been made by said Sioux City & Northern Railroad Company and how much is still due and payable thereunder.

Answer; Payments due to us were made as follows:

March 14th, 1892	$18,750
June 14, 1892	18,500
June 21st 1893 to correct error	250
Sept. 28th, 1892	18,750
Dec. 19th, 1892	18,750
March 21st, 1893	18,750

As I have stated before the amount of the payment upon which the Sioux City and Northern R. R. defaulted June 14th, 1893 was paid by A. S. Garretson out of his private funds; there was on December 14th, 1894 due and payable to us under the lease $112,500.

Cross Interrogatory 23; You may state whether the Trust Company of North America is now the assignee and holder of said lease and when it became such.

Answer; It is my understanding that the lease was assigned to this Company as Trustee in the Trust Deed of January 1st, 1890.

Cross Interrogatory 24; You may state for what purpose the Sioux City & Northern Railroad Company during the period of said lease has used the property of said Terminal Company.

Answer; I have no knowledge of the purpose for which the Sioux City & Northern Railroad has used the property of the Terminal Co. during the period of the lease.

Cross Interrogatory 25; You may state whether said Trust Company of North America has released in whole or in part the said Sioux City & Northern Railroad from the terms and conditions, or any of them, of said lease, and if it intends to so release said Sioux City & Northern Railroad Company or its receivers therefrom.

Answer; This company has not released the whole or in part the Sioux City and Northern Railroad Company from the terms and conditions, or any of them of said lease; Its intentions in the future are unknown to me.

Cross Interrogatory 26; You may state what action is being taken on behalf of the [Trist] Company of North America to enforce its claims and rights against the said Sioux City & Northern Railroad and the property of the same under and by virtue of the provisions of said lease.

Answer; Legal steps have been taken to enforce our landlord's lien, and to obtain an order of Court for the payment of rent.

Cross Interrogatory 27; You may state whether or not the rentals accrued and accruing and that may hereafter accrue under said lease do not constitute a first and prior claim against said Sioux City & Northern Railroad and its property?

Answer; This is a legal proposition and my individual opinion upon it is they are.

Cross Interrogatory 28; You may State what action the Trust Company of North America is taking to secure
139 and [enofrce] what right it has under said lease against said Sioux City & Northern Railroad Company, its property or receivers.

Answer; It has intervened in certain litigation pending in the Courts of Iowa with the view of securing a landlord's lien upon the property of the Sioux City and Northern R. R. Company, the tenant of the premises, and it has asked the Court for an order on the Receivers to pay the rent.

Cross Interrogatory 29; Before accepting the trusteeship, what if any investigation did you make of the property of the Sioux City Terminal Railroad & Warehouse Company and what if any investigation did you make of the provisions of its articles of incorporation?

Answer; A representative of this Company and several other parties made examinations of the property and the Company employed able counsel in Sioux City and in this City who made a thorough investigation of all matters pertaining to the title and incumbrance upon the property and furnished to us there written opinion upon the same.

Cross Interrogatory 30; Did you have a copy of the articles of incorporation at that time?

Answer; This and all matters involving the legality and validity of all transactions were examined by our counsel upon whose advice we alone acted.

Cross Interrogatory 31; Did you know that its authorized capital stock was only one million dollars?

Answer; My answer to this is the same as my answer to the last Interrogatory.

Cross Interrogatory 32; Did you know that all of this stock had been issued?

Answer; My answer to this is the same as my answer to the 30th Cross Interrogatory.

Cross Interrogatory 33; Did you know how the stock of the Sioux City Terminal Railroad and Warehouse Company was alleged to have been paid for?

Answer; My answer to this is the same as my answer to the 30th cross interrogatory.

Cross Interrogatory 34; Did you have copies of the records of said Terminal Company or did you have said records examined prior to [accpeting] the trusteeship or at any time, and if so, when?

Answer; Prior to accepting the trust we had all matters which were necessary to the ascertainment of the fact that the trust deed was a first incumbrance upon a good and clear title, and that the company making it was fully competent in law to create such an obligation, examined by able counsel whose opinion was given to us in writing.

Cross Interrogatory 35; Please attach copies of all written instruments with the Trust Company of North America in connection with said trust deed and bonds issued thereunder.

Answer; The only written instruments which I can recall as emanating from the Terminal Company to this Company are the trust deed and the directions to deliver the bonds when certified copies of which instruments are hereto attached, Marked Exhibits A & B.

Cross Interrogatory 36; Did you know that the stock of the Sioux City Terminal Railroad & Warehouse Company had been issued without consideration?

Answer; I did not.

Cross Interrogatory 37; Did you know that the Sioux City Terminal Railroad & Warehouse Company for its stock had received no money?

Answer; I did not.

Cross Interrogatory 38; Did you investigate or cause to be investigated what assets the Sioux City Terminal Railroad &

Warehouse Company had raised out of the issuance of
140 its one million dollars of stock?

Answer; Our counsel [thouroughly] investigated all these matters.

Cross Interrogatory 39; At the time you certified to the bonds of said Terminal Company, what other indebtedness was there against said Terminal Company?

Answer; None that I know of; I only certified these bonds after I was advised by Messrs. Joy, Hudson, Call & Joy, Craig L. Wright and Samuel Dickson, our counsel, that every examination had been made necessary to ascertain the fact that these bonds were a legal and first lien upon the property and after they had certified to us that these bonds were a good and valid first incumbrance upon a good and valid title.

Cross Interrogatory 40; How many of the bonds of said Terminal Company are now held and owned by the Trust Company of North America, and what did it pay for them?

Answer; It does not seem to me to be pertinent to this issue what amount of bonds are held by this corporation or what it paid for them inasmuch as it holds none in its capacity as Trustee under this Deed of Trust and before answering it I would like to be advised by counsel.

Cross Interrogatory 41; Attach a true copy of said trust deed with all indorsements and certificates thereon to wit, the trust deed from said Terminal Company to the Trust Company of North America.

Answer; I produce a verified printed copy of the Deed to be attached as requested to this deposition; Marked Exhibit A.

Cross Interrogatory 42; Did the Trust Company of North America at the time of accepting said trusteeship, know that prior thereto said Sioux City Terminal Railroad and Warehouse Company had leased all its property, real and personal, including its franchises and privileges, to the Sioux City & Northern Railroad Company, for the period of one hundred years?

Answer; The facts stated in the mortgage of which a copy is attached, constituted my knowledge on the subject.

Cross Interrogatory 43; What if any amounts were taken from the special loan account for union depot construction and used for the payment of interest upon said Terminal bonds or any of them?

Answer; Mr. Garretson had a private account with this Company upon which no one could draw but himself; when the Sioux City & Northern R. R. Co. defaulted in the payment due under the lease, June 28th, 1893, Mr. Garretson for reasons of

his own, drew a draft in our favor for the sum of $18,750 mentioned in my answer to 21st cross interrogatory.

Cross Interrogatory 44; At the time you became trustee what improvements did you understand had been made or were contemplated upon the property of said Terminal Company?

Answer; We understood in a general way that numbers of warehouses, storehouses, buildings for various kinds of business were to be constructed as rapidly as tenants desiring them could be obtained in addition to the general Union Depot; but none had been commenced and were merely in contemplation.

Cross Interrogatory 45; You may state whether or not an investigation and report was made as to the value and condition of the Terminal Property preliminary to accepting the trust, and if you answer in the affirmative attach a true copy of such report or reports together with all indorsements thereon.

Answer; As I have stated this Company investigated the value and condition of the Terminal property in many ways preliminary to accepting this trust; the reports were entirely satisfactory and made orally in person; if any written reports were added I do not find them with the papers.

141 Cross Interrogatory 46; State fully the arrangement and method under which the Trust Company of North America paid over to A. S. Garretson, or the Sioux City Terminal Railroad & Warehouse Company the special fund to be used in the construction of the Union depot and train sheds.

Answer; As has been stated, no fund was ever set apart for the construction of the Union Depot and train sheds. Mr. Garretson upon his individual credit, and upon collateral deposited by him, borrowed from this Company and a number of other gentlemen the sum of $225,000 which was placed to his private credit in this company. One of the inducements to this Company for lending Mr. Garretson their share of this money was his statement that it would be applied to the improvements of the Terminal property, as it owned some of the bonds and he, to induce it to make this loan promised that it should have an oversight of his drafts upon the account. It was further agreed that his drafts should be accompanied by vouchers of contractors and the architects certificates that the moneys had gone into the construction of this building; this agreement was with Mr. Garretson individually and not with the Sioux City Terminal Railroad and Warehouse Company.

Cross Interrogatory 47; Were payments made out of the said special fund upon certification of the architect or receipts of the general contractor or both, and if you answer in the

affirmative attach true copies of said certificates together with all indorsements thereon.

Answer; My answer to the previous Interrogatory covers this one. The certificates and vouchers referred to are now in the possession of its control Messrs. Joy Call and Joy.

Cross Interrogatory 48; State fully how payments were made out of such special fund to be used in the construction of the Union depot and train sheds to the Sioux City Terminal Railroad & Warehouse Company, or to A. S. Garretson.

Answer; My answer to cross interrogatory 46 covers this cross interrogatory.

Cross Interrogatory [29]; Were the million and a quarter dollars of bonds involved in this suit all certified and delivered at the same time and as one and the same transaction, and if you answer in the negative, state why there were not certified and delivered at the same time, and as one and the same transaction.

Answer; They were so certified and delivered at the same time.

Cross Interrogatory 50; Give the actual date on which the first bonds were certified and delivered, how many and to whom.

Answer; I cannot state the exact date in the early part of 1890 on which the bonds were certified and delivered; they were all certified at the same time and delivered to A. S. Garretson as directed by the Terminal Company.

Cross Interrogatory 51; Has the Trust Company of North America in its possession a register of certification and delivery of the bonds involved in this suit; and if you answer in the affirmative attach to your answer a full and true copy of such register.

Answer; These being coupon bonds there was no such register kept anywhere.

Cross Interrogatory 52; Were all the payments of the special fund for the construction of the Union depot and train shed made upon certificates of the architect and receipt of the general contractor or both?

Answer; If you mean the moneys which were deposited here in Mr. Garretson's account I answer, nearly all, but not all.

Cross Interrogatory 53; Have you attached to your answers all papers, correspondence, agreements, accounts, data and documents called for in the foregoing interrogatories?

Answer; I believe I have.

142 (Signed) JOHN CADWALADER.

State of Pennsylvania,
County of Philadelphia—ss.

I, Samuel T. Jaquett, a Notary Public in and for said County and state, hereby certify that under and by virtue of the commission hereto attached, the foregoing deposition of John Cadwalader was taken before me, and after the same had been reduced to writing by me and read over to the said witness, was subscribed and sworn by the said deponent therein at 505 Chestnut Street, Philadelphia in said County on the 11th day of January A. D. 1895.

In testimony whereof I have hereunto set my hand and affixed my official seal this Fifteenth day of January A. D. 1895.

[Seal] SAMUEL T. JAQUETT,
Notary Public.

143 EXHIBIT A OF COMPLAINANT'S BILL.

Mortgage between Sioux City Terminal Railroad and Warehouse Company and the Trust Company of North America, for $1,250,000, Dated January 1st, 1890.

This indenture, made this first day of January in the year one thousand eight hundred and ninety, between the Sioux City Terminal Railroad and Warehouse Company, of Sioux City, Iowa of the first part, and the Trust Company of North America, in Philadelphia, Pennsylvania, of the second part, witnesseth:

Whereas, the Sioux City Terminal Railroad and Warehouse Company is a corporation organized, created and existing under the laws of the State of Iowa, and has lawful power and authority to construct, operate, and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side-tracks, passenger and freight depots, yards, warehouses, storage-houses, elevators, and all other needful terminal facilities, and has the power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, and to hold, use, and control the same, and to construct, operate, and maintain one or more lines of railway from the depot and yards of the said company in Sioux City, one to run in an easterly direction to the east line of Woodbury County, Iowa, one to run in a westerly direction to the Big Sioux River and out in a northerly direction to the Iowa State line, and to lease grounds and buildings, and to purchase and hold any grounds for the use and purposes of said company, and to mortgage, lease, or sell the said grounds and improvements thereon.

And whereas, the city council of the said city did on the twenty-ninth day of May 1889, and on the fifth day of December 1889 by ordinances grant unto the Sioux City and Northern Railroad Company, its successors, lessees and assigns, the right of way over, along, across, and upon certain streets, alleys, and public grounds of the City of Sioux City Iowa, and the right to construct railway tracks, and to operate steam cars thereon, which ordinances were duly approved by the mayor of said city, on the seventh day of June 1889, and on the eleventh day of December 1889 respectively;

And whereas: Said city council of Sioux City, Iowa, did upon the fifth day of December 1889, by ordinance, duly passed and approved by the mayor of said city on the eleventh day of December 1889, and duly published, authorize and empower the Chicago, Milwaukee and St. Paul Railroad Company to assign and transfer to the said Sioux City & Northern Railroad Company, its lessees and assigns, the franchise and right to construct operate and maintain a railroad track upon Second Street in said city of Sioux City, between Lafayette Street in Central Sioux City and Nebraska Street in Sioux City East Addition, which right was conferred upon the said Chicago Milwaukee & St. Paul Railroad Company by an ordinance of the City of Sioux City, and which right the said Chicago Milwaukee and St. Paul Railroad Company has contracted to and has transferred to the said Sioux City and Northern Railroad Company, its lessees and assigns in accordance with the power given in said ordinance.

And whereas, said City Council of Sioux City Iowa did upon the twenty-sixth day of December 1889, by ordinance
144 duly passed and approved by the mayor of said city on the twenty-seventh day of December and duly published authorize and empower the Sioux City and Northern Railroad Company to assign transfer sell and convey unto the Sioux City Terminal Railroad & Warehouse Company all the franchises and privileges and grants acquired by the said Sioux City and Northern Railroad Company under the said ordinances of May 29th, 1889, and December 5th 1889, over, across, along and upon the certain streets, alleys and public grounds in the city of Sioux City between Division Street in Central Sioux City and the west side of Douglass Street in Sioux City East Addition mentioned in said ordinances, excepting only so much thereof as is embraced in the right of way for track on the north side of Second street between the east side of Lafayette Street in Central Sioux City, and the west side of Nebraska Street in Sioux City East Addition which said last named excepted track the said Sioux City and

Northern Railroad Company has been authorized to transfer and convey to the Chicago Milwaukee and St. Paul Railroad Company, with all the rights and powers by the said ordinances granted and conveyed.

And whereas, the said Sioux City and Northern Railroad Company, by deed of assignment dated the fourteenth day of December 1889 granted, assigned, transferred, and set over to the party of the first part all the rights, powers, permission, privilege, and authority granted and conferred by the said ordinances for said railroad tracks between Division Street in Central Sioux City, and the east side of Douglas Street in Sioux City, East Addition, and the said transfer from the Chicago, Milwaukee and St. Paul Railroad Company, to be held, used, exercised and enjoyed by the said party of the first part herein, and as fully as if the same were possessed by and vested in the said Sioux City and Northern Railroad Company.

And whereas, said Sioux City Terminal Railroad and Warehouse Company has leased to the Sioux City and Northern Railroad Company the grounds, lines of railway side-tracks, yards, warehouses, storage houses, elevators, passenger and freight depots and other terminal facilities of said party of the first part, either now held by said first party, or hereafter to be acquired by it, for the period of one hundred years, for the annual rental of ninety thousand dollars payable quarterly of which amount seventy-five thousand dollars annually and necessary costs of trusteeship shall be paid in quarterly installments as aforesaid, to the trustee hereinafter named for the payment of the interest on the bonds hereby secured, with power to the said railroad company to sub-lease said property and franchise on the conditions in said lease named.

And whereas, the said Sioux City Terminal Railroad and Warehouse Company has full power and authority under the laws of the State of Iowa, to create this present issue of bonds and to secure the same by mortgage upon all its property, leases and franchises.

And whereas, at a meeting of the stockholders of the Sioux City Terminal Railroad and Warehouse Company held on the fourteenth day of December 1889, the following resolution, among others, was adopted.

And whereas, it is the judgment of the stockholders of this company that it is expedient to make an issue of bonds not to exceed the sum of one million two hundred and fifty thousand dollars for the purpose of completing payment upon its railroad, and the purchase of necessary grounds, for its lines

of railway, side-tracks, passenger and freight depots, yards, warehouses, storage-houses, elevators, and other terminal facilities within the corporate limits of the city of Sioux City, and of completing and constructing such lines of railway, side-tracks, passenger and freight depots, yards warehouses, storage-houses, elevators and other terminal facilities, and any other lawful purpose of said company.

145 Resolved: That this company make and issue, in the name and under the corporate seal of this company, one thousand two hundred and fifty bonds, of the sum of one thousand dollars each, amounting in the aggregate to one million two hundred and fifty thousand dollars, numbered from 1 to 1250 inclusive; and that a mortgage, dated the first day of January 1890, be made to the Trust Company of North America, as trustee, securing all the said bonds, without distinction or priority of one over another, upon the grounds, franchises, leases, rights, privileges, lines of railway, side tracks, ware-houses, storage-houses, elevators, and other terminal facilities of this company within the corporate limits of the city of Sioux City, and that the board of directors of this company be authorized empowered and requested to take all necessary steps and to pass all necessary resolutions for the carrying into effect of the purpose of this resolution;

And whereas: At a meeting of the board of directors of the Sioux City Terminal Railroad and Warehouse Company, held on the fourteenth day of December 1889, the following preamble and resolutions were adopted by an affirmative vote of all the members of the board of directors: Present, A. S. Garretson, T. P. Gere, D. E. Paullin, to wit:

Whereas: It is the judgment of the board of directors that it is expedient to make an issue of bonds in amount in the aggregate not to exceed the sum of one million two hundred and fifty thousand dollars, for the purpose of completing the payments upon its railroad, and the purchase of necessary ground for its lines of railway, side-tracks, passenger and freight depots, yards, warehouses, storage-houses, elevators, and other terminal facilities, within the corporate limits of the City of Sioux City Iowa; and of building and constructing such lines of railway side-tracks, passenger and freight depots, yards, warehouses, storage houses, elevators, and other terminal facilities and for the other lawful purposes of this company;

Resolved: That this company make and issue in the name and under the corporate seal of this company one thousand two hundred and fifty bonds of the sum of one thousand dol-

lars each, amounting in the aggregate to one million two hundred and fifty thousand dollars, numbered from 1 to 1250 inclusive, which bonds shall be in general form and substance as follows:

EXHIBIT "A."

United States of America, State of Iowa.

The Sioux City Terminal Railroad and Warehouse Company.

First Mortgage Gold Bond.

No. $1000

The Sioux City Terminal Railroad and Warehouse Company promises to pay to the holder of this bond, on the first day of January 1900 at the office of the Trust Company of North America, in Philadelphia, Pennsylvania, one thousand dollars, United States gold coin of or equal to the present standard of weight and fineness, and interest thereon in the meantime at the rate of six per cent per annum, payable at the same place in like gold coin, semi-annually, on the first day of July and on the first day of January in each year, upon presentation and surrender of the annexed coupons therefor, as they severally mature, free from all United States, State and Municipal taxes that may be required by law to be deducted by said company from said interest; the company hereby assuming to pay the same.

This bond is one of a series of bonds not exceeding in the aggregate one million two hundred and fifty thousand dollars, and is secured by a mortgage or deed of trust, duly made and delivered by the said company to the Trust Company of North America, trustee for the holders of all of said bonds,
146 which said mortgage is a first lien upon the real estate and improvements of the said Terminal Railroad and Warehouse Company with appurtenances and improvements thereon, or to be placed and erected thereon, and all leases, rights, privileges and franchises held by this company.

This bond shall pass by delivery or by transfer on the books of the trustee but after registration of ownership no transfer except on the books of the trustee shall be valid, unless the last transfer be to bearer, and this bond shall continue subject to successive registrations and transfers to bearer at the option of the holder.

This bond or any bond purporting to be secured by said deed of trust shall not be collected or valid for any purpose unless certified by the said trustee.

In witness whereof, the said Terminal Railroad and Warehouse Company has hereunto affixed its corporate seal, and caused these presents to be signed by its president and secretary at Sioux City, Iowa, this first day of January 1890.

[Seal] ....., President.
....., Secretary.

(Form of Coupon.)

$30 No....

On the first day of July ... the Sioux City Terminal Railroad and Warehouse Company will pay to the bearer, at the office of the Trust Company of North America, in Philadelphia, Pennsylvania, thirty dollars United States gold coin, being six months interest due that date on its first mortgage bond No.

....., Secretary.

(Form of Trustee's Certificate.)

It is hereby certified that this bond is one of the bonds described in the mortgage deed of trust therein mentioned.

THE TRUST COMPANY OF NORTH AMERICA
Trustee.
By .....President.

And, Resolved: That a mortgage dated the first day of January, 1890, be made to the Trust Company of North America, as trustee, securing all the said bonds, without distinction or priority of one over the other, upon the grounds, rights, franchises, privileges, leases, lines of railway, sidetracks, passenger and freight depots, yards, warehouses, storage-houses, and all other needful terminal facilities of this company within the corporate limits of the city of Sioux City, Iowa, either now held by this company or which it may hereafter acquire, and the president and secretary of this company are hereby authorized empowered and directed to make and execute the said bonds and the said mortgage and to take all necessary steps and execute all necessary papers for the issuing and disposing of said bonds.

Said mortgage securing said bonds shall be made substantially in the following form:

(Giving the Form of this Indenture.)

Now this indenture witnesseth: That the said Sioux City Terminal Railroad and Warehouse Company for the better

securing the payment of the principal and interest of the aforesaid bonds, has granted bargained, sold, transferred, and conveyed to the said The Trust Company of North America, trustee, all and singular the following described property situated in Woodbury County, Iowa, and within the corporate limits of the city of Sioux City, Iowa, to wit:

All of block twenty-six; all of block twenty-seven; all of block twenty-eight; all of block twenty-nine; all of block thirty; all of block thirty-one, except lots 1, 2, 3, 4, 5, and 6; and all of block forty-four, in Central Sioux City; also the east half of block thirteen; all of block fifteen, lot 10, 11, and
147 12, and the west third of lots 2 and 3 in block seventeen Middle Sioux City; Lots 1 and 2 in block twenty-five; all of block 26; lots 2, 3, 4, 5, and 6, 10, 11, and 12, in block 27, lots 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 in block 28; lots 8 and 9 in block 29, Sioux City East addition, together with all buildings and improvements thereon, and all railway lines, side-tracks, yards, passenger and freight depots, warehouses, storage-houses, elevators, and other terminal facilities now or hereafter erected thereon. Also all rights, privileges, franchises and leases of every kind and nature whatsoever now held by this company, or that may hereafter be acquired by it, including the rights and franchises and also the indenture of lease dated the fourteenth day of December 1889, between the said Sioux City Terminal Railroad and Warehouse Company, and the Sioux City and Northern Railroad Company, and all right, title, and interest of the said Sioux City Terminal Railroad and Warehouse Company into and under the lease to the Sioux City and Northern Company therefor; also all property rights and hereditaments of every kind and nature whatsoever, that may hereafter be acquired by this company within the corporate limits of Sioux City, Iowa.

To have and to hold, all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part, its successors and assigns, forever;

In trust, nevertheless, for the equal pro rata benefit and security of all and every person or persons or bodies corporate who may be or become the holders of the said bonds, issued under and secured by this Deed of Trust or mortgage, or such of them as shall be issued by the party of the first part, without preference priority or distinction as to lien or otherwise, of any over the others by reason of priority in the time of issuing or negotiating the same or otherwise, and so that each and all of the said bonds issued and to be issued as aforesaid shall have the

same right, lien, and privilege under and by this deed of trust or mortgage, and shall all be equally secured thereby with like effect as if they had all been made, executed, delivered, and negotiated simultaneously with the date hereof; it being intended that the lien and security of all of the said bonds shall take effect from the date of the execution and delivery of this deed of trust or mortgage, whether the same shall actually be issued or sold or disposed of at such date, or whether they or any part of them shall be negotiated and sold at some future date, and that the lien and security of this deed of trust or mortgage and all the bonds that may be issued under the same, shall take effect from the date of the execution and delivery hereof, as though the said bonds were upon such date actually sold and delivered to and held by innocent holders for value, and the lien and security of said bonds shall in no manner be altered, impared or prejudiced by the creation of subsequent deeds of trust or mortgage by the Sioux City Terminal Railroad and Warehouse Company, or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

And it is hereby expressly covenanted and understood by and between the parties hereto that the said above described premises property rights privileges and franchises are to be had and holden by the said trustee, upon and for the trusts, uses and purposes following, that is to say:

First. The party of the first part shall make execute and deliver to the party of the second part, bonds of the party of the first part intended to be secured hereby to the amount of one million two hundred and fifty thousand dollars, and the party of the second part shall forthwith certify or countersign said bonds, and deliver the same to the party of the first part on the execution and delivery hereof, and when bonds or obligations are countersigned or certified by the trustee
148 to the effect that they are issued under and secured by this deed of trust or mortgage, such certificate shall be conclusive that said bonds or obligations have been issued in accordance with and are entitled to the security of this deed of trust or mortgage.

Second. Until default shall be made by the party of the first part in payment of the principal or interest of such bonds, or any of them, according to the tenor and effect of such bonds, or until default be made by the party of the first part in respect to some act or thing in any of such bonds or herein required to be done, the party of the first part its successors and assigns, shall possess, manage, operate, use and enjoy the premises, property, terminal facilities, and railway and its

appurtenances hereby mortgaged, and take and use the rents, income and profits thereof, as if this indenture had not been made, and on payment in full of all the bonds hereunder issued all interest and estate hereby vested in the party of the second part shall cease and all the premises and property hereby conveyed shall be surrendered and delivered to the party of the first part, who shall hold and possess the same as if this instrument had not been executed.

Third. And whereas by the terms and stipulations of said indenture of lease of December 14th, 1889 the Sioux City and Northern Railroad Company, the lessee thereunder, has expressly covenanted and agreed to pay an annual rental of ninety thousand dollars, payable quarterly and to pay of said rental seventy-five thousand dollars thereof directly to the Trust Company of North America Trustee herein, to apply on the interests of the bonds issued by the said Sioux City Terminal Railroad and Warehouse Company and secured by mortgage given to the said The Trust Company of North America this present mortgage being thereby designated and intended and such other portion of ninety thousand dollars as shall be necessary to pay the expenses of the trusteeship of the said trustee, it is hereby further covenanted and agreed that the trustee shall be clothed with all the rights and powers authority and discretion which by the terms of the said indenture of lease are vested in the party of the first part for the enforcement of the payment of the said seventy-five thousand dollars in each and every year and of such further sums as shall be necessary to pay the expenses of the trusteeship of the said trustee, and shall also be entitled to all the remedies which are reserved or granted to the lessors by or under said indenture of lease, for the recovery of the moneys agreed thereby to be paid and for the enforcement in every respect of the rights of the lessor or party of the first part, and the party of the first part in case of default herein shall whenever required, assign and transfer such indenture of lease to the said Trustee to be held for the uses and trusts in this indenture set forth. And in case of such default, the said trustee shall be also entitled to all rents due or to become due from any tenants or persons or corporations occupying or using any of said property or franchises under any sub-lease or contract from said Sioux City and Northern Railroad Company to be applied in the payment of the principal or interest of said bonds and said trustee or purchasers under said mortgage shall be entitled to all the remedies to collect said rent given by law or by said sub-leases.

Fourth. The party of the first part agrees to pay all taxes and assessments upon the premises and property hereby

granted; and also on being requested to do so, to pay all proper charges of the trustee hereunder, and all reasonable disbursements incurred by it in the performance of its duty as such trustee, and not to suffer any lien or attachment superior to the lien created hereby to be enforced thereon, and not to commit or suffer any waste thereof and to keep and maintain the said railway and premises and property hereby mortgaged in good order and condition, and to keep all its structures and insurable property hereby mortgaged well and suffi-
149 ciently insured and to deposit the policies of insurance or certificates thereof with the trustee, and in case of loss or injury by fire the proceeds of insurance shall be set apart from all other funds, and used only in repair or renewal of the property injured or destroyed or for construction or improvement of any part of the railroad or property included or to be included in this deed of trust or mortgage.

Fifth. In case default shall be made in the payment of the interest to accrue on any of said bonds, and such interest shall remain unpaid for the period of sixty days after demand, or the party of the first part shall suffer or allow the taxes or charges to fall in arrear, whereby the security of the mortgage may be impaired or shall refuse or fail to keep or perform any of the covenants and stipulations herein or in said bonds contained on its part to be kept and performed, the whole principal of said bonds together with all interest accrued and remaining unpaid thereon, shall, at the option of the said trustee, become due and payable, but a majority in interest of the holders of all of the said bonds then outstanding shall have the right and power, by an instrument in writing under their hands to instruct and require the said trustee to exercise such option, and proceed as if such principal were payable, or to waive the right to do so, and also the right and power to reverse or annul the exercise of any option which shall have been made by the said trustee in the premises and the said trustee shall act accordingly.

Sixth. In case default shall be made in the payment of any interest to accrue on any of the said bonds when the same shall become payable and such interest shall remain unpaid and in arrear for sixty days after it shall have been duly demanded or in case default shall be made in the payment of the principal of said bonds hereby intended to be secured, or any or either of them when the same shall become due and payable according to the tenor of the said bonds, whether by lapse of time or default in the payment of interest, or if the party of the first part shall suffer or allow any taxes or charges to fall in arrear, whereby the security of this mortgage may

be impaired, or shall refuse or fail to keep or perform any of the covenants or stipulations herein or in said bond contained on its part to be kept and performed, then and in either of those cases it shall be lawful for the trustee herein, and upon the written request of the holders of a majority in interest of the said bonds outstanding, and an adequate indemnity being given to such trustee against all costs, expenses and liabilities to be incurred in executing this article it shall be the duty of the said trustee to enter into and upon and take possession of the railroad and property hereby conveyed or mortgaged or intended so to be and each and every part thereof, and to hold, use, manage, maintain and operate the said railroad, and the business of the party of the first part, by its own managers, superintendents, receivers, or servants, to as full an extent as the party of the first part may lawfully do until the amount due for principal or interest as the case may be shall be paid, or until a sale of said mortgaged premises or property shall be made as hereinafter provided; and during said period from time to time to make, at the expense of the trust estate, such repairs and replacements and useful alterations, extensions, additions and improvements thereto, as well in respect to terminal facilities rolling stock and equipment as to said railroad and its appurtenances, as may seem to the said trustee judicious and proper, and to collect and receive all incomes, rents, issues and profits thereof, and every part thereof, and after deducting the expenses of operating said railroad and property and of conducting the business of the party of the first part and of all repairs, replacements, alterations, extensions, additions, and improvements, as aforesaid, and all taxes and assessments and other charges upon said property and premises and every part thereof, as well as just and reasonable compensation for its own services, and the services of all agents, clerks, and servants properly engaged or employed including reasonable attorney's and counsel fees, then to apply the moneys arising as aforesaid to the payment without preference priority or distinction to one bond over another, first of the interest due on the bonds then outstanding, and hereby intended to be secured, and secondly of the principal of such bonds in full if said income and proceeds be sufficient, but if not, then pro rata.

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Seventh. The provision in the sixth article is cumulative to the ordinary remedy by foreclosure in the courts and the trustee herein may at his discretion and shall upon the written request of the holders of a majority in value of the outstanding and unpaid bonds which may have been issued hereunder, and upon being properly indemnified and whenever entitled so to do by the terms hereof, institute proceedings to foreclose this

mortgage whenever a majority of said bondholders may direct; and in the absence of any such direction, then as the said trustee may deem expedient. Provided, always, and it is expressly declared and agreed that no holder or holders of a bond, or of any bonds secured hereby shall have the right to institute any suit, action, or proceedings in equity, or in law, for the foreclosure of this indenture or the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy, without first giving notice in writing to the trustee herein of default having occurred and continued as aforesaid, and unless a majority in amount of the holders of bonds then outstanding have made request in writing to the said trustee as above provided, and have afforded it a reasonable opportunity to proceed to exercise the powers hereinbefore granted or to institute such action, suit, or proceeding in its own name, and have also offered adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby and such notification, request and offer of indemnity are hereby declared to be conditions precedent for the execution of the powers and trusts of this indenture to any action or cause of action for the foreclosure for the appointment of a receiver or for any other remedy hereunder; and provided also, that neither the trustee nor the holder or holders of the bonds intended to be hereby secured or any of them shall sell the premises hereby mortgaged or inteded to be so, or any part thereof, or institute any suit, action, or proceedure in law or equity, for the foreclosure hereof or for the appointment of a receiver, otherwise than in the manner herein provided.

Eighth. The party of the first part does hereby irrevocably waive the benefit and advantage of any or all valuation, stay, appraisement, redemption or extension laws, and of all laws requiring deeds of trust, mortgages, liens, hypothecation or other securities for money to be foreclosed by action therefor now existing, or which may hereafter exist, or where the said sale may take place which but for the provisions herein might prevent or postpone the sale of said premises, property, rights, privileges and franchises to the purchaser under the powers and upon compliance with the provisions herein provided; and said party of the first part does hereby covenant with the said party of the second part the said trustee or its successor or successors in the trust hereby created that it will not in any manner set up or seek to take the benefit or advantage of any such valuation, stay, appraisement, redemption or extension laws.

151 Ninth. And it is further covenanted and agreed, that at any sale of the aforesaid property, railroad ap-

purtenances, and franchises or either or any part thereof, whether made by virtue of any power herein granted, or by judicial authority, the trustee, if requested so to do in writing, by the holders of a majority in interest of all the bonds hereby secured and then outstanding, or if to his satisfaction indemnified, may bid for and purchase the same, for and on behalf of all the holders of the bonds hereby secured and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable and proportionate price, if but a portion thereof be sold, or if the whole property be sold, at a price not exceeding the total amount of such bonds outstanding with the interest accrued thereon and the expenses of such sale. In case of a sale of the mortgaged premises, or any part thereof, in the course of judicial proceedings, as hereinbefore provided, the purchaser or purchasers at such sale in making payment of the purchase money and making settlement thereof, after making a cash payment sufficient to cover the costs and expenses of the sale and all other charges which must be provided for in actual cash, shall have the right to deliver and pay to the trustee, and turn in and use towards the payment of the purchase money, any of the bonds or matured coupons held by him or them to or toward the payment of which the net proceeds of such sale shall be legally applicable the amount of such bonds or coupons so to be paid in to be determined and fixed by the trustee, and at a sum which shall upon a proper distribution and accounting for such proceeds, be at least equal to the share or proportion payable out of such proceeds to such purchaser or purchasers as the holder or holders of such bonds or coupons; and in the event of a purchase of the whole property as aforesaid by said trustee, the right and title hereto shall vest in said trustee, in trust for the purchasers and each holder of bonds and coupons shall have an interest in the property so purchased in the proportion that his bonds and coupons bear to the entire issue of bonds and coupons outstanding; and the trustee shall take such lawful measures as may be deemed necessary to organize a new company for the benefit of those for whom the purchase was made, and the trustee so purchasing shall make such conveyance or conveyances of the premises so purchased to such new corporation as may be deemed necessary.

Tenth. A majority in interest of the holders of all the bonds secured hereby then outstanding shall have the right and power by an instrument in writing under their hands to instruct and to require the trustee herein to exercise any option or privilege hereby conferred upon him in respect to entering into or upon said mortgaged premises, or foreclosing the same, or selling the same, or in respect to any other act

to be done by the said trustee hereunder, or to waive the right to do so; and also the right and power to reverse or annul the exercise of any such option or privilege which shall have been made by said trustee in the premises, and the said trustee shall act accordingly.

Eleventh. The trustee shall hereafter keep at its office appropriate books for the registry and transfer of the bonds secured and to be secured hereby in accordance with the terms of said bonds and any and every holder of bonds secured hereby shall be entitled to have his name and address and the number and denomination of the said bonds held by him, entered therein, upon presenting at the said office a written statement of the said particulars, signed by himself, and if required duly verifying his title to the said bonds by the production thereof, or upon written order, duly verified of the person last registered as the holder.

Twelfth. In case of any foreclosure sale under the provision hereof, the purchaser shall be entitled to turn towards the payment of such purchase-money any of the bonds and matured coupons secured hereby, counting the same at
152 the sum payable out of the net proceeds of such sale thereon after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale, and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, to make such settlement by receipting the amount to be credited thereupon.

Thirteenth. The word "Trustee" as used in this instrument, shall be construed to mean the trustee for the time being, whether original substituted or new, and such trustee shall be vested with all the estate, powers, rights, authority and privileges hereby granted to and conferred on said party of the second part; no trustee herein shall be in any manner responsible for any act default or misconduct of any co-trustee or of any agent appointed to do any of the matters or things herein provided for; and it is hereby further covenanted and agreed and this trust is accepted upon the express condition that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering said party of the first part to retain or be in possession of the railroads, buildings, terminal facilities, equipments estates and premises hereby mortgaged, or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall the trustee be or become responsible or liable for any destruction

deterioration, determination, loss, injury, or damage, which may be done, or occur to the railroads, buildings, terminal facilities, equipments, estates and premises hereby mortgaged, or agreed or intended so to be, either by the said party of the first part or their agents or servants, or by any other persons whomsoever; nor shall the trustee be in any way responsible to see to the application by the party of the first part of the proceeds of the bonds hereby secured, not for the consequences of any breach on the part of the party of the first part of any of the covenants herein contained; nor of any act of the party of the first part, their agents or servants; nor shall the trustee be held liable for any act, or fault, or misconduct of any agent or persons employed by it, unless chargeable with culpable negligence in the selection or in the continuance of their employment; nor shall the trustee be answerable except for its own willful default or misconduct or gross misconduct.

The party of the second part shall not be under any obligation to take any action towards the execution of this trust, which, in its opinion, will be likely to involve it in a personal expense or liability, unless one or more of said bondholders shall, as often as required by said trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding. The trustee herein may resign and discharge itself of the trust hereby created by notice in writing to the party of the first part, to be given at least three months before such resignation shall take effect, or such shorter time as the party of the first part shall accept as adequate; and whenever a vacancy shall occur in the office of trustee hereunder, by resignation or otherwise, the holders of a majority in value of the bonds hereby secured then outstanding shall by an instrument or concurrent instruments in writing executed under their hands and seals or the hands of their attorneys in fact duly authorized for that purpose, and filed in the office of the Clerk of the District Court of Woodbury County, Iowa, appoint a trustee hereunder in which case upon such filing of said instruments or instrument, the trustee thereby appointed shall without any further act, deed or conveyance become the trustees hereunder. An appointment made in the manner hereinbefore prescribed by or in behalf of the holders of a majority in interest of the bonds hereby secured then outstanding shall supersede any appointment to fill a vacancy theretofore made in any other manner whatsoever, and any trustee appointed to fill any such vacancy, or to succeed any trustee hereunder shall be vested with
153 and entitled to all the rights, title, interest and estate, powers, duties, and trusts herein conveyed and contained as if originally named in this mortgage. Upon the

resignation or removal of any trustee, all his powers and authority shall cease, but said trustee shall on demand execute a deed or deeds of conveyance to vest in the trustee appointed in his place and upon the trusts herein expressed, all the property, rights, privileges and franchises which may be held upon the said trusts.

Fourteenth. If the party of the first part, its successors or assigns, shall and do well and truly pay, or cause to be paid, unto the person or persons, bodies politic or corporate who shall become holders of the bonds intended to be secured hereby the several and respective sums expressed therein, on the day and time hereinbefore mentioned for the payment thereof, together with the lawful interest of the same, according to the provisions of the said recited obligations or bonds, or in accordance with the provisions hereof, and shall well and truly keep, and perform all the stipulations covenants agreements and things herein required to be kept and performed by the party of the first part, according to the true intent and meaning of these presents, without any fraud or further delay, then and from thenceforth, as well this present indenture and the estate and property hereby granted and conveyed or hereby intended so to be, as the said recited obligations, shall become void and of no effect anything hereinbefore contained to the contrary thereof notwithstanding and satisfaction shall be forthwith entered by the trustee upon the record of this indenture of mortgage, otherwise the same shall be and remain in full force and virtue.

Fifteenth. The said party of the first part shall and does hereby covenant and agree to and with the said trustee that it will upon reasonable request make, do, execute and deliver any further act, deeds, conveyances, as assurances which may be necessary or proper for the better assuring unto the said trustee the premises, property railroad appurtenances, rights, privileges, franchises hereby mortgaged, or intended so to be, or far carrying out the purposes and objects of this instrument.

In witness whereof: The said party of the first part has caused this instrument to be executed by its president, with its corporate seal attached, and attested by the signature of its secretary and the said party of the second part in evidence of its acceptance of the trust hereby created has caused these presents to be signed by its

president, and its corporate seal attested by its secretary to be hereto affixed this first day of January A. D. 1890.

THE SIOUX CITY TERMINAL R. R. & WAREHOUSE CO.
By A. S. GARRETSON, President.
[Seal] Attest, D. E. PAULLIN, Secretary.
THE TRUST COMPANY OF NORTH AMERICA.
By JOHN CADAWALADER, President.
[Seal] Attest J. WALN VAUX, Secretary.

Sealed and delivered in the presence of.

State of Iowa,
Woodbury County—ss.

Be it remembered: That on this first day of January 1890, before me C. L. Wright, a Notary Public in and for Woodbury County State of Iowa, personally appeared A. S. Garretson, the president of the Sioux City Terminal Railroad and Warehouse Company and D. E. Paullin, the secretary of said
154 company, to me personally known to be such president and secretary, and to be the identical persons who signed and executed the foregoing instrument and indenture of trust deed for and on behalf of the Sioux City Terminal Railroad and Warehouse Company as its president and secretary, and each acknowledged the said instrument to be the voluntary act and deed of the said Sioux City Terminal Railroad and Warehouse Company grantor therein named by them as its president and secretary thereunto duly authorized, voluntarily done and executed.

Witness my hand and notarial seal at my office in Sioux City Iowa in said county, the day and year first above mentioned.

[Seal] C. L. WRIGHT,
Notary Public in and for Woodbury County, Iowa.

State of Pennsylvania,
County of Philadelphia—ss.

Be it remembered: That on this eighteenth day of February A. D. 1890 before me Samuel T. Jaquett, a notary public duly commissioned in and for said county, came John Cadwalader, President of The Trust Company of North America, of Philadelphia, Pennsylvania, and J. Waln Vaux, Secretary of said company, to me personally known to be the president and secretary of said company, and to be the identical persons who signed and executed the within indenture of trust deed as the president and secretary of the said The Trust Company of

North America, and acknowledged the execution of the within indenture of trust deed and the written signature of The Trust Company of North America thereto, to be the voluntary act and deed of said The Trust Company of North America, by them as its president and secretary, thereunto duly authorized and that the same was executed by them as such president and secretary for the purposes and by the authority therein set forth.

Witness my hand and notarial seal, the day and year aforesaid.

[Seal] SAMUEL T. JAQUETT,
Notary Public in and for the County of Philadelphia and State of Pennsylvania.

State of Iowa,
Woodbury County—ss.

Filed for record this 27th day of February A. D. 1890, at 12 M. and recorded in Book 68, pages 587 et seq of mortgages.

C. A. DEMUN, Recorder.

EXHIBIT "Aa."

This indenture, made this fourteenth day of December A. D. 1889 by and between the Sioux City Terminal Railroad & Warehouse Company of Sioux City, Iowa, hereinafter denominated the Terminal Company, party of the first part, and The Sioux City & Northern Railroad Company, of Sioux City Iowa, hereinafter denominated the Railroad Company party of the second part, Witnesseth;

Whereas, the said Terminal Company a corporation of the State of Iowa, is the owner of the real estate hereinafter described, and has been organized with power and authority to construct, operate, maintain own or lease one or more lines of railway within the corporate limits of the city of Sioux City with all needed side tracks, passenger and freight depots, yards, and warehouses and all other needed facilities, and to acquire all needed grounds for right of way, tracks and depot purposes, side-tracks, wood and water stations, and to
155 hold, use, control and lease the same, and with other powers in said articles of incorporation as by the statutes of the State of Iowa provided;

And whereas, the city council of the city of Sioux City did, on the twenty-ninth day of May, 1889, and on the fifth day of December 1889, by ordinances, grant unto the said Railroad Company party of the second part, its lessees and assigns the right of way, over, along, upon and across certain streets alleys

and public grounds, in the city of Sioux City, and the right to construct railway tracks, and operate steam cars thereon which ordinances were duly approved by the mayor of said city on the seventh day of June 1889 and the eleventh day of December 1889 respectively.

And whereas, the City Council of the city of Sioux City did, upon the fifth day of December 1889, by ordinance duly passed and approved by the mayor of said city on the eleventh day of December 1889, and duly published authorize and empower the Chicago, Milwaukee and St. Paul Railway Company to assign and transfer to the Sioux City and Northern Railroad Company, its lessees and assigns, the franchise and right to operate and maintain a railroad track upon Second Street, in said city of Sioux City between LaFayette Street in Central Sioux City and Nebraska Street in Sioux City East Addition, which right had been conferred upon the Chicago, Milwaukee and St. Paul Railway Company by ordinance of the city of Sioux City, and which right the said Chicago, Milwaukee and St. Paul Railway Company has heretofore contracted to and transferred to the Sioux City and Northern Railroad Company its lessees and assigns.

And whereas, the said Railroad Company party of the second part, by deed of assignment, dated the fourteenth day of December 1889, granted, assigned, transferred and set over to the said Terminal Company party of the first part, all the rights, powers, permissions, privileges, and authority granted and conferred by said ordinances for said railroad tracks, between Division Street in Central Sioux City, and the east side of Douglass Street in Sioux City East Addition, and the said transfer from the Chicago Milwaukee and St. Paul Railway Company for said track on Second Street aforesaid, to be held, used, exercised and enjoyed by the said Terminal Company, party of the first part, and as fully as if the same were possessed by and vested in the Sioux City and Northern Railroad Company.

And whereas, the said Terminal Company party of the first part has been vested with power by its stockholders and board of directors to execute and deliver and will execute and deliver its first mortgage to the Trust Company of North America of Philadelphia Pennsylvania to secure an issue of bonds to an amount not exceeding one million two hundred and fifty thousand dollars, which mortgage is to cover, embrace, and include all of the real estate of said Terminal Company and all the rights of way franchises, and all rights acquired or to be acquired under and by virtue of the said ordinances assignments and transfers aforesaid.

And whereas, It is further provided in said mortgage under said power given as aforesaid, that so much rental in this lease

provided as shall be necessary to pay the interest upon said bonds and the necessary costs of trusteeship shall be paid in quarterly installments to the trustee in said mortgage named.

And whereas, The said Sioux City Terminal Railroad and Warehouse Company and the Sioux City and Northern Railroad Company have each been duly authorized and empowered by resolutions of the stockholders and board of directors of said respective companies to execute and deliver these presents and the same has been in all respects approved and the officers of said company duly authorized to execute the same,

Now therefore: The party of the first part, the said Terminal Company, in consideration of the covenants and agreements of the party of the second part, hereinafter set forth, doth
156 by these presents lease and rent to the party of the second part the following described property, to wit: All of block 26; all of block 27; all of block 28; all of block 29; all of block 30; all of block 44; lots 7 to 16 inclusive in block 31; all in Central Sioux City; the east half of block 13; all of block 15; lots 10, 11 and 12, and west one-third of lots 2 and 3 in block 17, all in Middle Sioux City; lots 1 and 2 in block 25; all of block 26; lots 2, 3, 4, 5, 6, 10, 11, and 12 in block 27; lots 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 in block 28; lots 8 and 9 in block 29, all in Sioux City East Addition, together with all buildings and improvements thereon or that hereafter may be erected thereon, and all railway lines side tracks, yards, passenger and freight depots, warehouses, storage-houses, elevators, and other terminal facilities now thereon or that may hereafter be erected thereon; also all rights, privileges, franchises, rights of way of every kind or nature whatsoever, held by this company or that hereafter may be acquired by it, including all rights and franchises acquired by it under and by virtue of the ordinances and contracts aforesaid, so transferred to it, the purpose being hereby to lease to the said party of the second part all of the property, rights of way, franchises, and improvements now or hereafter owned by the said party of the first part in Sioux City, Iowa, and all property rights and hereditaments that may be acquired by this company within the corporate limits of the City of Sioux City, Iowa, all of the above described property being in the county of Woodbury and State of Iowa.

To have and to hold the same to the party of the second part subject to the conditions hereinafter stated from the fourteenth day of December 1889, to the fourteenth day of December 1989.

And the party of the second part in consideration of the covenants and agreements in the lease to the premises above set forth covenants and agrees with the party of the first part to pay to the party of the first part as rent for the same, the

annual rental of ninety thousand dollars payable quarterly and the said party of the second part agrees to pay of said rental seventy-five thousand dollars thereof directly to the Trust Company of North America, of Philadelphia, Pennsylvania, to apply on the interest of the bonds issued by said Terminal Company and secured by said mortgage given to said The Trust Company of North America of Philadelphia, Pennsylvania, hereinbefore referred to, and such other portion of said ninety thousand dollars as shall be necessary to pay the expenses of the trusteeship of said trustee before mentioned.

And it is further agreed, that the party of the second part shall have full right, power and authority to sub-let any portion of said real estate, improvements, depots, warehouses elevators, terminal facilities, tracks, side-tracks, and any other property included in this lease to any other corporation or person, and the rental therefor shall be payable to the said party of the second part so long as there shall be no default in the payment of the rental herein provided for or no default in the payment of the interest or principal of the bonds given by said Terminal Company, and secured by said mortgage to the Trust Company of North America of Philadelphia, Pennsylvania. But it is further understood and agreed, that if there shall be any default in the payment of the rental herein provided for to the party of the first part or in case there should be any default in the payment of the interest or principal on said bonds issued by said Terminal Company and secured by said mortgage to said The Trust Company of North America, of Philadelphia, Pennsylvania, then said rental so due or to become due from such corporation or persons sub-leasing any portion of said real estate, terminal grounds, terminal facilities, or tracks, or buildings shall be payable to the said trustee named in said mortgage given by said Terminal Company afore-
157 said, and the same shall be held and applied by the said trustee to the payment of the interest upon said bonds aforesaid, and the said trustee shall have all the remedies given by law, or by virtue of said sub-leases by way of distress or otherwise, to enforce the collection of the said rents; and the said party of the second part covenants with the party of the first part that during the continuance of said lease they will keep and maintain the said improvements, tracks, and buildings now or hereafter placed upon said premises in as good repair as the same now are or at any time shall be placed, by the party of the first part, damage by superior force and inevitable necessity or fire from any other cause than the carelessness of the said lessee excepted, and at the expiration of the term of this lease, or forfeiture thereof, they will yield up said premises and property to the party of the first part, without

further notice in as good condition as when the same was entered upon by the party of the second part or constructed by said party of the first part, loss by fire or inevitable accident ordinary wear and tear excepted.

And it is further expressly agreed, between the parties hereto, that if default shall be made in the payment of the rent above reserved or any part thereof, or any of the covenants herein contained to be kept by the party of the second part, and such default shall continue for a period of thirty days, it shall be lawful for the party of the first part or its legal representatives to enter into and upon said premises and property, or any part thereof, either with or without process of law, and repossess the same at the election of the party of the first part, and to distrain for any rent that may be due thereon upon any property belonging to the party of the second part, and in order to enforce a forfeiture for non-payment of rent it shall not be necessary to make a demand on the same day the rent shall become due, but a failure to pay the same at the place aforesaid or a demand and a refusal to pay on the same day, or at any time or any subsequent day, shall be sufficient and after such default shall be made the party of the second part shall be deemed guilty of forcible detainer of the said premises under the statute, and in case of such forfeiture, it is further understood, that all subleases or contracts for the use of any of said premises and franchises, or grounds or right of way or any parts thereof as may be made by the party of the second part, under the power herein given shall inure to the benefit of the party of the first part; and the said trustee under the mortgage aforesaid given by said party of the first part or the purchasers if any that may hold title under said mortgage by official sale or otherwise, shall have and be clothed with all the rights, powers, authority and discretion which by the terms of said leases, sub-leases or contracts are vested in the party of the first part, and shall be entitled to all the remedies which are reserved or granted to the lessor by or under said leases subleases or contracts for the recovery of any and all moneys due thereon, as rental or otherwise and for the enforcement in every respect of the rights of the lessor or party of the first part.

In witness whereof, the parties hereto have caused these presents to be signed by the president and secretary respectively of said companies on the day and year last above written.

THE SIOUX CITY AND NORTHERN RAILROAD COMPANY.

[Seal] By T. P. GERE, President.
F. C. HILLS, Secretary.

THE SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY.

[Seal] A. S. GARRETSON, President.
D. E. PAULLIN, Secretary.

158 State of Iowa,
Woodbury County—ss.

On this twenty-first day of January A. D. 1890, before me C. L. Wright, a notary public in and for said county and State personally came T. P. Gere and F. C. Hills, personally to me known to be the president and secretary respectively of the Sioux City and Northern Railroad Company, party of the second part in the foregoing instrument, and also personally appeared A. S. Garretson and D. E. Paullin, president and secretary, respectively, of the Sioux City Terminal Railroad and Warehouse Company, personally to me known to be such officers of said company, and acknowledged the execution of the foregoing instrument to be the voluntary act and deed of said respective companies, by them as such officers thereunto duly appointed and authorized.

Witness my hand and notarial seal on the day and year last above written.

[Seal] C. L. WRIGHT,
Notary Public in and for Woodbury County, Iowa.

EXHIBIT "B"

At a meeting of the Board of Directors of the Sioux City Terminal Railroad & Warehouse Company duly called and held at the office of the Company in Sioux City Iowa, on the thirtieth day of June 1890, at which the following Directors being a quorum were present.

A. S. Garretson, T. P. Gere and D. T. Hedges, the following resolution was unanimously adopted:

Resolved: That the Trust Company of North America, Philadelphia, Trustees, under the mortgage made by this Company dated January 1, 1890, be authorized and they are hereby instructed to deliver the 1250 bonds of the denomination of $1,000

each, secured by said mortgage, to the order of A. S. Garretson Esq.

Certified from the minutes.

T. P. GERE, Vice President.
Attest D. T. HEDGES, Sec'y.

[The Sioux City Terminal Railroad
and Warehouse Co. Iowa.
Corporate Seal.]

159 "The Trust Company of North America offers in evidence the mortgage from the Sioux City Terminal Railroad & Warehouse Company to the Trust Company of North America, and it is agreed by all parties hereto that the copy thereof attached to the evidence of John Cadwalader shall stand in lieu of and with the same force and effect as the original, without being repeated in the evidence."

160 The Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard trustee, and E. H. Hubbard assignee at the trial offered in their own behalf the following evidence:

John Hornick, of lawful age, a witness produced on the part of all parties to said action other than the Trust Company of North America, after being duly sworn by Mamie E. Brooks, Commissioner testified as follows:

Examination.

Examined by H. J. Taylor of Spalding Taylor & Burgess.

Q. What is your name?
A. John Hornick.
Q. Your occupation?
A. Wholesale drugs.
Q. You knew of the organization of the Sioux City Terminal Railroad & Warehouse Company?
A. Yes, sir.
Q. And of the Sioux City & Northern Contracting Company?
A. Yes, sir.
Q. And of the Sioux City & Northern Railroad Company?
A. Yes, sir.
Q. Who was president of the Sioux City Terminal Railroad & Warehouse Company in 1889 and from that time or until 1893?
A. A. S. Garretson.
Q. Was A. S. Garretson a member of the Sioux City & Northern Contracting Company?
A. Yes, sir.

Q. And who were the other members of the Sioux City & Northern Contracting Company?

A. D. T. Hedges, Ed. Haakinson, James E. Booge, John Hornick.

Q. And were those the same members who composed the partnership often called "the railroad syndicate?"

A. Yes, sir.

Q. Now referring back to the latter part of 1889 and the earlier part of 1890 you may state whether or not this syndicate owned the stock of the Sioux City & Northern Railroad Company?

A. They did. The Sioux City & Northern owned the stock of the Sioux City Terminal Railroad & Warehouse Company.

Q. Then I understand that you say that the Sioux City Terminal Railroad & Warehouse Company's stock was owned by the Sioux City & Northern Railroad Company and that the stock of the Sioux City & Northern Railroad Company was owned by "the railroad syndicate?"

A. Yes, sir.

Q. And that the "railroad syndicate" composed the Sioux City & Northern Contracting Company?

A. Yes, sir.

Q. You recollect the fact of a trust deed from the Terminal Company to the Trust Company of North America in the early part of 1890?

A. Yes, sir, I remember about it.

Q. In general you may give the boundary of the property of the Terminal grounds, between what streets at the east and at the west?

A. Division Street on the east, and Pearl Street on the west, and between 2nd street on the south and 3rd street on the north; I don't mean to say that they owned all the property between those streets but they owned the majority of the property.

Q. Do you recollect where the first general offices
161 were upon the Terminal grounds?

A. It was in a building facing on Douglas street and about opposite the present Terminal depot; it was on the south side of the alley between 2nd and 3rd streets, facing east.

Q. About where was the first freight depot and the first depot used upon the Terminal grounds for railway purposes, temporary depot?

A. I have forgotten the street, but it is about one block east of the Illinois Central tracks between 2nd and 3rd streets.

Q. You recollect the fact of railroad tracks being laid upon the Terminal grounds?

A. Yes, sir.

Q. At what point were they first laid?

A. From Division Street west, between 2nd and 3rd.

Q. Did that reach this freight depot you speak of near Lafayette Street?

A. Yes, sir.

Q. Have you any means of fixing the exact date when those were laid?

A. Why, they commenced about November 1889, to lay the tracks west from Division Street, if I remember right.

Q. When the Sioux City Terminal Railroad & Warehouse Company was organized was it organized for the purpose of taking the ownership and possession of these terminal grounds?

A. When the Sioux City & Northern was organized, there was nothing said about terminal grounds; there was no arrangements made for terminal grounds; the Sioux City & Northern Railroad Company was organized sometime in July 1889. The reason that I know that it was in July we took a trip up over the road, and the wheat was just turning, and I should fix it about July, after we returned, that the organization took place.

Q. Of the Sioux City Terminal Railroad & Warehouse Company?

A. No of the Sioux City & Northern Railroad Company, and later the Sioux City Terminal Railroad & Warehouse Company was organized.

Q. Had the Sioux City & Northern Contracting Company been organized before the Sioux City Terminal Railroad & Warehouse Company was organized?

A. Yes, sir.

Q. Was that a corporation or this railroad syndicate partnership.

A. It was a railroad syndicate partnership.

Q. From the time the Sioux City Terminal Railroad & Warehouse Company took title to the property sought to be foreclosed in this action and property purporting to be covered by the trust deed to the Trust Company of North America, what was the purpose and scope of the plans in reference to the improvements upon these terminal grounds, if you know?

Objected to by Mr. Call as incompetent immaterial and hearsay.

A. That matter was all talked over and arranged; we were to build certain buildings on the terminal grounds and there was money held back on the property quite a while to finish the depot, the union depot that is now completed; held back by the Trust Company of North America of Philadelphia.

Q. How much money if you know, was held by the Trust Company of North America for the purpose of building the new passenger depot on the terminal grounds?

Objected to by Mr. Call as incompetent & hearsay.

A. If I remember right, it was $250,000 about that.

Q. At the time this Terminal Company took title to these terminal grounds, was it understood and agreed that
162 there should be constructed a passenger depot and other buildings and tracks and side-tracks and switches on these terminal grounds?

The same objection by Mr. Call as last above ma[illegible] to all this testimony with regard to the intention of the [illegible]mpany that it is incompetent and hearsay.

A. Yes, sir.

Q. Who were the parties who considered and determined these questions in regard to the improvements on the terminal grounds?

A. There were several meetings called by the syndicate, all members of the syndicate heretofore named were present, and agreed on what they should do in reference to building depots and warehouses; I remember in two or three of the meetings, and the first ones, where there was plats of tracks and plats of where the different buildings were to be located; I examined them, and sketches of the style of building etc., that was to be built on the grounds.

Q. Was that before any improvements had been made?

A. I think so; before there was very much improvements made on the grounds.

Q. Before any improvements or any tracks were laid upon the grounds, was the fact of a new union depot passenger depot, to be located somewhere upon the grounds understood and agreed upon?

A. Yes, sir.

Q. At which portion of the grounds was the location of the Union Passenger depot to be?

A. The present location at the corner of Douglass and 2nd running east to Pierce Street.

Q. Was that the understanding and agreement from the very first?

A. Yes, sir.

Q. You may state generally the improvements that were made from the laying of the first track across Division Street on the Terminal grounds down to the construction of the passenger depot in general the improvements that were done, and whether they were continuous from the very first or practically so.

A. We commenced laying track from Division Street west, I located the date about November 1889; the depot between Lafayette and Clark, I think was open for business in December

1889. It was an old building moved on there and fixed up for the temporary freight depot, in fact, I was going to say passenger but I think the passenger train was run up to the Illinois Central some arrangements made to run up to the old passenger depot; I don't remember the exact date that the large iron warehouse that is now used for agricultural implements, et cetera was co[illegible]ed. I think it was built there in a part of 1890. I know [illegible] pretty sure it was, 1890. All the buildings that were [illegible]ed to begin with were built, it was a continuous building and moving of buildings that were in the way, all the time until completed.

Q. You may state whether or not the improvements as finally made upon the terminal grounds were made in accordance with the understandiing and agreement that the members of the railroad syndicate had at the time the Terminal Company was organized?

A. The depot was carried out to the letter, with the exception of the train shed that was contemplated vacating Pierce Street between 2nd and 3rd and running east through the largest portion of the next block. I will state that the building was built and completed just as we contemplated with the exception of this train shed.

163 Q. Then the original plan was to have a larger passenger depot than the one actually constructed?

A. Well, not any larger, only the train shed. An iron shed to form a platform so the passengers could get off.

Q. And what was the fact as to the freight houses?

A. The freight houses were all completed as contemplated first, and planned.

Q. And how was it as to the laying of tracks and side-tracks and switches and all improvements of that kind, coal bins?

A. To the best of my knowledge, they were all laid as first contemplated; Mr. Fred C. Hills superintended, or he was authority for the laying of tracks on the terminal grounds and it was carried out as per his plans.

Q. What was the purpose of the organization of the Sioux City Terminal Railroad & Warehouse Company, and what was it organized for, what was it agreed and understood that it should do?

A. At the time it was organized we hoped to interest all other railroads running in here and make it a union depot, interest all other roads running in here to run into this depot, on a rental basis, and all other roads that should come in here, it was talked over that all other roads should come in here, that we should try and have them run into this depot.

Q. Then was it to furnish passenger terminal facilities for all railroads entering Sioux City?

A. That was the purpose of the organization.

Q. At first what railroads used these terminal grounds as terminal facilities and what railroads now use them?

A. At first there was only the Sioux City & Northern used them, and afterwards there was an arrangement whereby the Nebraska & Western, known as the Short Line used them. Then arrangements were made for the Illinois Central to use them. I went to Chicago to see Mr. Harriman, vice president of the Illinois Central railroad to make preliminary arrangements to occupy the depots.

Q. Has the Sioux City & Northern or the Sioux City O'Niell & Western, called the Nebraska & Western any terminal facilities in Sioux City other than these terminal facilities of the Sioux City Terminal Railroad & Warehouse Company.

A. No, sir.

Q. Has the Illinois Central any passenger depot other than this?

A. No, sir; not at present.

Q. How is it in regard to freight; was it intended that the Terminal Company should furnish trackage and freight facilities as well as the passenger depot facilities?

A. It was hoped that we could furnish freight facilities for all roads excepting the Northwestern and the Omaha & St. Paul known as the Chicago St. Paul Minneapolis & Omaha, they at that time had their own depots, had their own freight depots. But we had hopes of furnishing the Milwaukee, I don't remember now whether the Milwaukee or not, but I remember quite well that we were certain that we could furnish the Illinois Central with freight depot. I don't remember whether the Milwaukee was built at that time or not; I think it was.

Q. I will ask you if these terminal grounds as completed are sufficient to furnish passenger depots for all the railroads in Sioux City?

A. Yes, sir, without a doubt.

Q. And are they or could they easily be made sufficient to furnish freight facilities?

A. Yes, sir.

Q. How many miles of trackage railway trackage, has the Terminal Company, if you know?

164 A. I don't know, I should guess about 15 or 20 miles.

Q. Was this Sioux City & Northern contracting company an incorporated company?

A. No, sir.

Q. Was it anything other or different from the railroad syndicate?

A. No sir, practically the same thing.

Q. What was the agreement of that contracting Company as to the different members of it sharing in the profits and losses of the enterprise?

A. We had a written memoranda contract where each participated in the losses and gains of the enterprises.

Q. Equally?

A. Equally.

Q. Had you any written contract in reference to the contracting company other than that one you had in reference to the construction of the Sioux City & Northern?

A. I think not.

Q. Did you ever have any written contract in reference to the Sioux City Terminal Railroad & Warehouse Company other than carrying over a contract which you had in connection with the Sioux City & Northern Railroad Company?

A. I think not.

Q. You think not?

A. If there was such a thing, I have got it in the safe, a private box in our safe; I don't remember of anything at this time.

Q. If you have such, would you produce it, make an examination and if found, would you produce it?

A. Yes, sir.

Q. What do you know as to the expense account for the work done on the Terminal grounds and the improvement of them being kept separate from the expense account for improvements, say upon the Sioux City & Northern Railroad Company?

A. There were separate accounts kept.

Q. What company paid for the improvements upon the terminal grounds?

A. The Terminal & Railroad Warehouse Company.

Q. Was that the understanding and agreement from the first?

A. Yes, sir, that there should be separate account kept; I don't know whether separate books were kept, but the account was kept so we could separate it and know just what the grounds costs and the expense of maintaining them.

Q. I will ask you to examine a paper marked by the Commissioner Exhibit "1" dated Sioux City Iowa July 3, 1889 and purporting to be signed by A. S. Garretson, Ed. Haakinson, John Hornick, D. T. Hedges and James E. Booge and state whether that, to the best of your judgment, is a copy of the contract under which the railroad syndicate was formed in the first instance.

A. It is a copy, as near as I can remember, of the memorandum contract between the members of the syndicate with relation to the Sioux City & Northern Railroad Company.

Q. What is the fact, if you know, as to whether the "railroad syndicate" continued their operations, including the acquisition and improvement of the terminal grounds under this same arrangement shown by this Exhibit "1"?

A. If my memory serves me right, the work was continued from the time it commenced on the Sioux City & Northern Railroad Company sometime in the latter part of July, the work was commenced on the Sioux City & Northern, until the tracks were all laid or nearly laid on the terminal grounds, without any stoppage.

165 Q. What properties did the "railroad syndicate" engage in the acquisition and improvement of other than the Sioux City & Northern, under the same arrangements that were had in reference to the construction of that property, if you know?

A. I don't remember of any excepting the Sioux City, O'Niell & Western.

Q. How in regard to the terminals?

A. Well, as I stated before as soon as the work was done on the Sioux City & Northern if I remember right, the date when the work was completed was sometime in December, 1889, the work was immediately commenced on the Terminal grounds; tracks were laid from Division street west.

Q. So this work of improvement kept up until the passenger depot was constructed?

A. Yes, sir.

Q. Then, if I understand you, all the improvements were made on the Terminal grounds under the same arrangements as far as the railroad syndicate was concerned?

A. Yes, sir.

Cross-Examination.

Cross-examined by Mr. Call of Joy, Call & Joy:

Q. What connection did S. L. Dows have with this contraction partnership?

A. He was an employe of the syndicate; he was paid something like $7,500 for his services; he superintended the construction of the road, building the road, buying the material.

Q. You were never an officer or director of the Sioux City Terminal Railroad & Warehouse Company?

A. I never was an officer, I think I was a director.

Q. When were you a director?

A. Well, I can't say positively that I was a director.

Q. Do you recollect ever attending any directors' meetings of that company?

A. Yes, sir.

Q. When?

A. At Mr. A. S. Garretson's office along in the early part of 1890.

Q. As a director?

A. If not as a director as a member of the syndicate.

Q. You didn't have any stock in it?

A. Yes sir, yes sir, the stock was owned by the Sioux City & Northern Railroad Company.

Q. Yes, the stock was owned by the Sioux City & Northern, but you didn't have any in yourself?

A. No.

Q. You were not a stockholder nor officer nor director of the company?

A. I won't say positively I was not a director, I think possibly I was not.

Q. And you don't know of your own knowledge do you of any contract that was made by the Sioux City Terminal Railroad & Warehouse Company with the Trust Company of North America?

A. Only as papers were produced by Mr. Garretson and statements made by him in meetings.

Q. You were not present in person at any negotiation or conversation when any deal was had with the Trust Company of North America?

A. The arrangements were made in Philadelphia, no I was not present.

Q. You know nothing about it of your own knowledge?

166 A. No, sir.

Q. All you know about it was what you heard Mr. Garretson or some one else say about it?

A. In part what he said about it, but I have seen statements as to what he had done and made statements in meetings that we attended several times, I remember.

Q. The same fact is true is it not in regard to these arrangements under which these tracks and buildings were constructed about all you know about the arrangement is what Mr. Garretson stated, isn't it?

A. No, sir, I attended meetings, a great many meetings where Mr. Garretson and Mr. F. C. Hills, who was then managing the property called us in, and showed us plats and specifications and the plats for the tracks, different tracks upon the different streets, and especially with reference to getting franchises across these different streets, I assisted.

Q. But you were not present, were you, when any contract was made by the Sioux City Terminal Railroad & Warehouse Company as a corporation for any of these improvements?

A. I think I was, sir.

Q. Which one?

A. I can't remember, for there was so many meetings.

Q. There wasn't any contract in which you took a part as a contracting party was there?

A. The contracts were signed by the officers of the Company, but were discussed in the meetings; as a member of the syndicate I knew what was going on.

Q. But if you know of any time when you were present when any contract was made by the Sioux City Terminal Railroad & Warehouse Company for any of these improvements, I wish you would state the time and what contract was made.

A. We had I remember quite well, meetings in the latter part of 1889, in reference to these contracts, I can't give you the exact date.

Q. Can you state what, if any contract was made when you were present, whether you can tell the date or not?

A. I can state as to some contracts made with Mr. Wall, in reference to building a depot, freight depot, brick depot, and I was present when the contract was made to build a depot, the passenger union depot with Mr. Wakefield, the contract was made with Mr. Wakefield.

Q. Is that all you can think of?

A. I was present when the contract was made to build the iron warehouse used as a forwarding warehouse now. I was present at a meeting when we talked of temporary depots and decided on buying this little building, no I don't think it was bought, it was a little building on the Terminal ground moved and placed for a freight depot; I don't remember who made the improvements on that property on the temporary freight depot.

Q. Were you present when any contract was made with reference to building new tracks upon the Terminal grounds, or sidings?

A. I don't remember whether I was or not; I was present when the grounds were laid out and the plats of the tracks and of the different depots it was all figured out.

Q. You mean at the time the general plan of improvement was agreed upon?

A. Yes, sir.

Q. That was the time when you had a sketch of the tracks and location of the buildings?

A. Yes, sir.

167 Q. And when was that?

A. That was in the latter part of 1890; I think it was December when that meeting occurred. It was shortly after the road was completed, the Northern Road was completed.

Q. In the fall of 1890?

A. The fall of 1889.

Q. Had you the plans of the side-tracks in the fall of 1889 the sidings?

A. I think so, yes, sir.

Q. Who prepared them?

A. Mr. F. C. Hills.

Q. Had there been any surveying?

A. Yes, sir, Mr. Wakefield done the surveying.

Q. Mr. Wakefield did the surveying?

A. Yes, sir.

Q. When did he do the surveying?

A. I can't tell the exact date, but if I remember right, it was in November or December 1889, he did some surveying and finished it later on; there was some main tracks, all the side-tracks wasn't put down at that time, but there was some main tracks put through the grounds up to the Terminal depots and it was a year afterwards before all the tracks were laid.

Q. I am talking about the time when the general survey was made and the plan of the general trackage system agreed upon. When did you have that general survey made and the general plan agreed upon of improvement?

A. I am not able to state.

Q. Isn't it a fact that the surveying was done during the winter and spring of 1890 and that the plan was then agreed upon in the spring of 1890 ?

A. No, I think it was earlier than that.

Q. Have you any way of fixing the time in your mind, any memorandum or book account?

A. Well, I have in this way, that it was a continuous job from the beginning of the building of the Sioux City & Northern until the tracks were laid and some of the tracks were laid in December 1889, and I know that a great deal of surveying was done as early as that.

Q. Isn't it a fact that you continued the surveying until the fall of 1890?

A. I think that perhaps that is a fact.

Q. Isn't it a fact that after laying the temporary tracks to Lafayette Street that you didn't do any more work until April until the surveying was made and the plans agreed upon?

A. I don't remember possibly that is so, that there might not have been very much done during the cold weather.

Q. And do you know, you say you remember of the laying of the temporary tracks in the fall of 1889 to Lafayette and Clark Streets?

A. Yes, sir.

Q. And the building of the temporary depot?

A. I think the depot was open for business in December 1889.

Q. Do you know who laid these temporary tracks?

A. I don't remember.

Q. Do you know under what arrangements they laid them there?

A. I don't know that; I don't know whether they were laid by,—I think a great many of these tracks were laid by the men that Mr. Hills employed to work in the yards, and I don't know that there was any contract made.

Q. Mr. Hills had charge of the Sioux City & Northern?

A. Yes, sir.

Q. He was not an officer of the Terminal?

A. I think he was.

168 Q. You think he was an officer of the Terminal Company?

A. He took part in all that work.

Q. Who for?

A. For the syndicate; I don't know whether he was an officer or not, but I am confident as can be that Mr. Hills laid out all those tracks and instructed Mr. Wakefield, I think Mr. Wakefield done the work as an engineer, laid out those tracks under Mr. Hills' instructions; I feel confident that that is a fact.

Q. You don't know what office if any, Mr. Hills held in the Terminal Company?

A. I can't remember now, there were so many different companies at that time I was attending.

Q. Have you any data to refresh your recollection of the time these temporary tracks were laid in Clark Street?

A. Only as I remember I kept no data. Why I think I am correct is this: Mr. Daws was to complete the road before the first of December before the cold weather, he was to complete the road so they could run trains over, and I am confident that that was so done. And as soon as the road was completed we were ready to work on those tracks on the Terminal grounds and I fix the date in that way.

Q. You would not deny the statement that the tracks were laid west from Division Street after the first of January?

A. I only state as I remember it, Mr. Call.

Q. You have no data or memorandum or journal entry?

A. No, sir.

Q. It is a mere matter of recollection with you?

A. I think the books of the Company probably would be the best evidence, I am only stating from memory.

Q. The syndicate didn't put any money into these Terminal grounds that you know of?

A. No, sir.

Q. Nor into the improvements?

A. No, sir.

Q. And so far as you know, the syndicate has no claim on these first mortgage bonds of the Terminal Company no ownership?

A. The bonds were sold to pay for the property: No, I don't know what Mr. Call is getting at.

Q. What I mean is whether the syndicate claimed to own these bonds, these first mortgage bonds on the Terminal Company, or any of them, so far as you know?

A. I can only state what the bonds were used for.

Q. State what your understanding of the matter was?

A. The understanding was that the bonds were to be sold and the proceeds to be used for the improvement of the property, to pay for the property and improvement of the property.

Q. In so far as you know, they were sold and the proceeds so used?

A. Yes, sir.

Re-Direct Examination.

Re-examined by H. J. Taylor, of Spalding, Taylor & Burgess.

Q. You say the money raised by the syndicate to carry out its work, not only as to the Sioux City & Northern but also as to The Terminal, was raised by what process or from what source or by what means was the money raised?

A. There was two members of the syndicate signed notes and they were discounted through the Union Loan & Trust Company. The understanding was that the stocks and bonds of the Company were to stay with the Union Loan & Trust Company as collateral security to the parties who signed the notes. The proceeds of the notes that were sold was
169 used by the syndicate.

Q. To what parties were these notes sold?

A. To banks; usually to banks through the country.

Q. About how much of the Terminal paper thus went through the Union Loan & Trust Company, if you know?

A. I can't state.

Q. About how much was outstanding at the time of the failure of the Union Loan and Trust Company on the 25th of April 1893?

A. Something like two or three hundred thousand dollars, possibly more.

Q. Wasn't it over seven hundred thousand dollars?

A. You are correct, it was over $700,000.

Q. That was then outstanding and unpaid?

A. Yes, sir.

Q. To what account were the proceeds of those notes placed in the Union Loan & Trust Company?

Objected to by Mr. Call, as not the best evidence.

A. They were placed to the credit of the syndicate.

Q. And in whose name and how was that on the books of the Union Loan & Trust Company, if you know, in whose name did that account stand?

A. Stood in my name.

Q. John Hornick, Trustee?

A. John Hornick, trustee.

Q. What was the security in agreement, and so far as you know, in fact, that the Union Loan & Trust Company has to its indorsement and as security to these notes thus negotiated through the Union Loan & Trust Company as to the Terminal properties, bonds and stocks, what was the agreement?

Objected to by Mr. Call, as incompetent, and not the best evidence.

A. There was no stock of the Sioux City Terminal grounds; the bonds that were sold were sold through the Trust Company of North America, and there was, if I remember right $250,000 retained for the completion of the Terminal grounds.

Q. The passenger depot?

A. The passenger depot.

Q. At the time these bonds were executed and even before that, what agreemnt, if any, was there on the part of the syndicate with the Union Loan & Trust Company as to these bonds being security with the Union Loan & Trust Company for its indorsement and for the notes of the syndicate so negotiated through the Union Loan & Trust Company, including the Terminal notes?

Objected to by Mr. Call, as last above.

A. The bonds that I speak of were the first mortgage bonds. They were disposed of; there was a second bond put out to secure the seven hundred and odd thousand dollars and other floating indebtedness of the Terminal grounds.

Q. What was the agreement with the Union Loan & Trust Company as to the properties of the railroad syndicate being collateral security with the Union Loan & Trust Company for this continuous indebtedness of the syndicate through the Union Loan & Trust Company?

A. It was understood that any stocks or bonds of the different corporations were to be held by the Union Loan & Trust Company as collateral to those notes that were out.

Q. Was it the agreement that the bonds as soon as issued, should be placed with the Union Loan & Trust Company also as security to this railroad syndicate indebtedness?

A. Yes, sir.

Q. Was that the understanding and agreement with the Union Loan & Trust Company and the railroad syndicate as to these bonds of the Terminal in advance of their issue?

A. Yes, sir.

Q. And was the indebtedness of this syndicate through the Union Loan & Trust Company by the negotiation of notes through the Union Loan & Trust Company to banks and various others, banks and bankers through the country, incurred under that understanding and agreement between the railroad syndicate and the Union Loan & Trust Company?

A. Yes, sir.

Q. About how large was the indebtedness on January 1890 of this railroad syndicate through the Union Loan & Trust Company?

A. What time in 1890?

Q. January 1st or December 31, 1889.

A. About $1,700,000 or $1,800,000.

Q. Was it at that time the agreement and understanding between the railroad syndicate and the Union Loan & Trust Company, that as soon as the Sioux City Terminal Railroad & Warehouse Company issued its bonds, that they should be placed with the Union Loan & Trust Company as collateral security to the Union Loan & Trust Company upon its indorsement and for the benefit of the holders of these syndicate notes?

A. Yes sir.

Q. Are you able to state of your own knowledge whether or not the bonds of the Sioux City Terminal Railroad & Warehouse Company when issued were actually placed physically with the Union Loan & Trust Company?

A. I cannot state.

Q. But was it the agreement and understanding between the Union Loan & Trust Company and the members of the syndicate that they should have been so placed?

A. Yes sir.

Q. What was the amount of this railroad syndicate indebtedness at the time of the failure of the Union Loan & Trust Company in round numbers?

A. About between $3,100,000 and $3,200,000.

Q. You may state whether it was by substitutions and renewals a continuous and constantly growing indebtedness

from December 31, 1889, to the time of the failure of the Union Loan & Trust Company.

A. Yes, sir, it was gradually growing larger on account of properties not paying the interest running up on the indebtedness increasing on the indebtedness.

It being noon, an adjournment was made until 2 P. M. of the same day.

2 P. M. March 5, 1895.

Re-examination resumed by H. J. Taylor of Spalding, Taylor & Burgess.

Q. Now, Mr. Hornick, you were a director during all this period in the Sioux City & Northern Railroad Company?

A. Yes sir.

Q. And were you an officer of the Sioux City & 171 Northern Railroad Company?

A. I was president part of the time.

Q. In 1889 and 1890?

A. In 1890 I am confident, I don't know whether in 1889 or not. I was vice-president in 1889 and president in 1890 I think. Captain Gere was president and he resigned and I was elected.

Q. What is your recollection as to whether you held any qualifying shares in the Terminal Company from the first?

A. I remember I held two or four shares.

Q. Was that true of all the other members of the syndicate also?

A. Yes sir.

Q. And do you know whether later on you were a director of the Terminal Company?

A. I was looking that matter up and I find that I was in 1893.

Q. How early in 1890 is it your recollection that you became president of the Sioux City & Northern Railroad Company?

A. I can't state, but I think it was in January 1890.

Q. And very soon after the first of January?

A. I don't remember.

Q. And prior to that you were vice-president?

A. Yes sir.

Q. Except the qualifying shares, as I understand you, all the stock was owned by the Sioux City & Northern Railroad Company?

A. Yes sir.

Q. And the stock of the Sioux City & Northern Railroad Company was owned by the syndicate?

A. Yes sir.

Q. Have you any recollection of seeing anything in these conferences or meetings of the Terminal Company of the syndicate of papers from the Trust Company of North America?

A. I can't say; I don't remember.

Q. Was this depot, freight depot, down near Lafayette Street temporary or a permanent depot?

A. Temporary.

Q. And how was it as to this building down on Douglass Street called the Allen House where the general offices first were?

A. Those were temporary offices, general offices.

Q. The Wakefield that you spoke of having to do with the surveying was L. F. Wakefield, the civil engineer?

A. Yes sir.

Q. Mr. Call asked you in regard to the properties down here, the real estate, Terminal grounds, being paid for with the proceeds of these bonds; is it not a fact, as you recollect it, that these bonds returned no proceds on their sale until July 1890?

A. It is a fact that we got no money on the bonds until July 1890.

Q. Then from what account or source was the Terminal property first paid for, at or about the time it was deeded to the Terminal Company?

A. It was paid for by the Union Loan & Trust Company out of proceeds of notes sold through them and signed by myself and Ed Haakinson.

Q. Were those the railroad syndicate notes?

A. Yes sir.

Q. Now you may state what arrangement and agreement there was between the railroad syndicate and the Union Loan & Trust Company as to what securities should be placed with the Union Loan & Trust Company for these notes and the holders of these notes?

172 A. The bonds and stock of the different properties was placed with the Union Loan & Trust Company as collateral for the notes signed by the syndicate and as collateral for the signers of the notes; the bonds and stock were placed there also for sale, when sold, the proceeds to go to this account, this syndicate account, of which I was trustee.

Q. That is, the account in the Union Loan & Trust Company?

A. The Union Loan & Trust Company.

Q. Was there any other method or means provided for the payment of railroad syndicate indebtedness through the Union Loan & Trust Company, other than the railroad syndicate properties or the moneys secured from the sale of bonds issued upon them?

A. No sir, there was no other fund to be drawn from.

Q. I will ask you as to the control of these corporations, such as the Terminal Company, as to determining what should be done in the improvement of its properties, and so on. What body of men considered and determined these questions?

A. The members of the syndicate.

Q. At whose instance were these subsidiary corporations, such as the Terminal Company organized?

A. A. S. Garretson's.

Q. And acting for whom was he in this?

A. The syndicate.

Q. What parties other than the members of the railroad syndicate were interested in the ownership of the Sioux City & Northern say the latter part of 1889 and the early part of 1890. Were any other parties?

A. James P. Wall had a couple of shares, I think of stock.

Q. And was that anything more than qualifying shares?

A. That is all. And T. P. Gere.

Q. But outside of the qualifying shares of directors, were any other persons interested?

A. How early?

Q. Say December 1889 and the very first part of say January 1890.

A. I don't remember of any other persons at that time.

Q. Was that true also of the Sioux City & Northern Contracting Company during that time?

A. Yes, sir.

Q. And was that true also of the Sioux City Terminal Railroad & Warehouse Company, excluding from your answer anything in connection with this deed to the Trust Company of North America?

A. That is true, sir.

Q. In case there were directors of these corporations including for instance the Terminal Company, other than members of the syndicate, at whose instance or request did those persons serve as directors?

A. Usually through A. S. Garretson.

Q. And for whom was he acting in that regard?

A. For the syndicate.

173 Re-cross Examination.

Re-cross examined by A. F. Call, of Joy, Call & Joy.

Q. With the exception of these few shares that you mention, the stock of the Sioux City Terminal Railroad & Warehouse Company was all turned over to the Sioux City & Northern?

A. Yes sir.

Q. And the Sioux City & Northern turned it all over to the Manhattan Trust Company about the first of January 1890 as security for its first bonds?

A. Why, I don't remember that that is a fact, it was my understanding that that stock at that time was in the Union Loan & Trust Company; that is my remembrance.

Q. The stock of the Terminal Company you mean?

A. Yes sir.

Q. Don't you know it was all turned over about the first of January 1890 to the Manhattan Trust Company?

A. I don't remember.

Q. Do you know whether as a matter of fact it was at any time in the Union Loan & Trust Company?

A. I was informed by Mr. Smith and Mr. A. S. Garretson that it was; I remember of asking Mr. Garretson whether it was there or not, as I was interested, signing notes for the syndicate, I wanted to know whether there was collateral behind my notes or not as security for my notes.

Q. When was that?

A. Along during 1890, 1891 talked over several times.

Q. That is all you know, what Garretson and Smith told you?

A. That is all.

Q. Do you know whether these bonds secured by the trust deed to the Trust Company of North America were ever actually with the Union Loan & Trust Company at any time?

A. I have no means of knowing, only what was stated to us in these meetings, that they were in the Union Loan & Trust Company; I never saw them in the Union Loan & Trust Company.

Q. Do you know where they were printed?

A. No, I think they were printed in New York, still I am not sure; there was some work done there.

Q. Do you know where they were certified?

A. I don't remember.

Q. The Trust Company of North America deed?

A. I think there was a deed made out here and there was some changes made, and a new deed made out in Philadelphia, I think that was the way it was done.

Q. You don't know anything about that?

A. No.

Q. You don't know anything about it at all yourself?

A. No, only—

Q. You don't know that those bonds were ever here after they were certified?

A. I couldn't state whether they were or not, the only means I have of knowing were the statements made by E. R. Smith and A. S. Garretson.

Q. You say you did know that those bonds were to be sold, placed on the market and sold?

A. Yes sir.

Q. And you know that they were sold and the proceeds received in Sioux City?

A. Yes sir.

Q. And you say those proceeds went into the Union Loan & Trust Company to take up that amount of the syndicate notes?

A. Yes sir.

174 Q. Do you know at what price they were sold?

A. I think it was 85 cents.

Q. Wasn't it 95 cents?

A. Perhaps it was.

Q. 95 or 98?

A. Hardly as high as that I don't remember now; there were so many different kinds of bonds and stock sold at different times I couldn't state.

Q. And you say you understand that when the original agreement was made between the syndicate and the Union Loan & Trust Company, that these bonds were to be sold?

A. They were to be placed in the Union Loan & Trust Company and sold when—

Q. An opportunity presented itself?

A. An opportunity presented itself.

2nd Re-direct Examination.

Re-examined by H. J. Taylor, of Spalding, Taylor & Burgess.

Q. Do you know, Mr. Hornick whether the proceeds actually came to the Union Loan & Trust Company at all, of the sale, or whether they came to the Terminal Company or to Garretson? Do you know what really became of the proceeds of the sale of the Terminal bonds?

A. It was stated at meetings that they had received this money and it was placed in the Union Loan & Trust Company.

Q. As to whether that was a fact or not —

A. I couldn't state.

Q. That would not apply to all of the bonds would it? Bonds that were held for the passenger depot, for instance?

A. Those bonds were originally, the money proceeds of those bonds were originally in Trust Company of North America until the passenger depot was completed.

Q. You don't know whether they have paid this out yet or not?

A. No sir.

2nd Re-cross Examination.

Re-cross examined by A. F. Call, of Joy, Call & Joy.

Q. And you don't know anything about that except what you have heard?

A. Only what I heard; that there was a balance, a small balance due somebody yet; that it wasn't all drawn out of the Trust Company of North America.

175 EXHIBIT "1."

Sioux City, Ia., July 3, 1889.

Memoranda of agreement between D. T. Hedges, John Hornick, Jas. E. Booge, Ed. Haakinson and A. S. Garretson.

Whereas, the aforementioned parties have associated themselves together for the purpose of building and equipping the Sioux City & Northern Railroad, said road to be built without delay from a point near Merrill Station, Iowa, to a junction with the St. Paul, Minneapolis & Manitoba road, at or near Palisades, Dakota, we further agree:

First. That all money borrowed and contracts made for the building of the road and for equipment shall be borne equally by all parties hereto.

Second. That should it be thought best for one member of the parties hereto to make contracts for materials or to execute notes for borrowed money, all such contracts and all such notes so executed by a single member hereof for the purposes herein expressed shall be the obligation of each of the parties to this contract, and each one hereto shall be equally liable therefor. All borrowed money to be placed to the credit of John Hornick, trustee, at the office of the Union Loan & Trust Company, and all moneys paid out to be paid out upon the order of said John Hornick, trustee, and vouchers to be taken therefor.

Third. That this contract shall hold good until said road is built, and until all debts in connection therewith are paid and this memoranda of agreement shall be left with the Union Loan & Trust Company until all of the conditions contained herein are fulfilled, and until its surrender is agreed upon by all the parties hereto.

Fourth. That all losses are to be borne equally by all the parties hereto and all profits to be divided equally between the parties to this contract.

A. S. GARRETSON.
ED. HAAKINSON.
JOHN HORNICK.
D. T. HEDGES.
J. E. BOOGE.

176 Ed. Haakinson of lawful age, a witness produced primarily on the part of E C. Wakefield, but whose evidence under the stipulation may be used by all the parties to this action, after being duly sworn by Mamie E. Brooks, Commissioner, testified as follows:

Examination.

Examined by H. J. Taylor, of Spaulding, Taylor & Burgess.

Q. You are in the employ of the receiver of the Sioux City Terminal Railroad & Warehouse Company?

A. Yes, sir.

Q. Are you able to state from your connection in that regard, about the gross income of the Sioux City Terminal Railroad & Warehouse Company, on its property?

A. Yes, I can state,—last year there was about $25,000 I believe gross income.

Q. Is the present rate keeping up to that?

A. No sir, I don't think so hardly; there are some tenants whose leases are not in force now.

Q. In that estimate, is there any railroad company that is using the Terminal Company's grounds that does not pay, that are not included in your estimate; was it used by the Sioux City & Northern for instance, and is that included in this estimate of yours that you gave? How much more should be included?

A. That rental for the Northern has not been fixed or agreed upon by the parties interested so far.

Q. How much does the Illinois Central pay?

A. They pay $3,000 for the use of the passenger station.

Q. And how much more do they pay for any other services?

A. They pay $3,000 for the use of the freight depot a year.

Q. Well, what would you say, giving a liberal estimate as what would be in your judgment a fair compensation from the Northern? Would you say $12,000 or $15,000 a year?

A. For the use of the tracks and yards and freight depot and passenger station I should say about $12,000.

Q. The rental of the Terminal grounds is in part in control of the Trust Company of North America, is it?

A. Yes, sir.

Q. Does that apply to the Union depot rents, too?

A. Yes, sir.

Q. And they have charge of the rental of the property except possibly some contracts with railroads on the Union depot itself?

A. They have charge of all collections now in force.

Q. And they are rendering all reasonable assistance in securing good rentals of the property, are they?

A. Yes, sir.

Q. When you said $25,000 gross income, you meant that was the annual income?

A. Yes, sir, I meant that was the annual income.

Q. (Showing witness paper). That is the signature of the Sioux City & Northern Railroad Company by T. P. Gere, to Exhibit "15"?

A. Yes, sir.

Q. These ordinances that are spoken of in Exhibit "15" are ordinances granted by the city to the Sioux City & Northern are they?

A. Yes, sir that is the way I understand it.

177 Q. Did the city receive any compensation for them or did it grant them without compensation to the parties indicated as receiving them?

A. Well, really I couldn't say as to that; I am not personally in a position to understand that question as to compensation.

Q. I mean did you pay money to the city for the ordinances?

A. Not that I understand.

Mr. Taylor offers Exhibit "15" in evidence.

It is stipulated and agreed that original Exhibits may be withdrawn and copies substituted to be used with the same force and effect as the originals.

EXHIBIT "15" M. E. B.

This indenture, made this 13th day of December in the year one thousand eight hundred and eighty-nine, by and between the Sioux City and Northern Railroad Company, a corporation of the State of Iowa, party of the first part, and the Sioux City Terminal Railroad & Warehouse Company, a corporation of the State of Iowa, party of the second part, witnesseth:

Whereas, the City Council of Sioux City, Iowa, did upon the 29th day of May, 1889, pass and adopt an ordinance, granting to the Sioux City & Northern Railroad Company, its successors, lessees and assigns, the right of way over, along, across and upon certain streets, alleys, and public grounds, in the city of Sioux City, Iowa, and the right to construct railway tracks, and operate steam railways thereon, which said ordinance was duly approved by Jonas M. Cleland, mayor of said city on the 7th day of June, 1889, and the same still remains in full force and virtue; and

Whereas, the City Council of Sioux City, Iowa, did upon the 5th day of December, 1889, pass and adopt an ordinance granting to the Sioux City and Northern Railroad Company, its suc-

cessors, lessees and assigns, the right of way over, along, across, and upon certain streets, alleys, and public grounds, in the city of Sioux City, Iowa, and the right to construct railway tracks thereon, and to operate steam railways thereon, which said ordinance was duly approved by Jonas M. Cleland, Mayor of said city, on the 11th day of December, 1889, and the same still remains in full force and virtue, and

Whereas, the City Council of Sioux City, Iowa, did upon the 5th day of December, 1889, pass and adopt an ordinance granting to the Chicago, Milwaukee & St. Paul Railway Company, the right and power to assign to the Sioux City and Northern Railroad Company its rights to a certain track and franchise for said track over and across a portion of Second street, in said city which ordinance was duly approved by Jonas M. Cleland, Mayor of said city on the 5th day of December, 1889, and the same still remains in full force and virtue, and

Whereas, the said ordinances have been duly published by the said Sioux City and Northern Railroad Company, at its expense, and are in force after such publication, as provided by law, and,

Whereas, the Chicago, Milwaukee & St. Paul Railway Company has, by contract, stipulated to transfer to the Sioux City and Northern Railroad Company its right to said track
178 in said ordinances before mentioned.

Now this indenture witnesseth, that the said Sioux City and Northern Railroad Company, for and in consideration of one million dollars ($1,000,000) hath granted, transferred, conveyed, assigned and set over, and by these presents doth hereby grant, transfer, convey, assign and set over, unto the Sioux City Terminal Railroad & Warehouse Company, all the rights, powers, licenses, franchises, and authority granted to and possessed by it, under and by virtue of the said ordinance of May 29, 1889 and under and by virtue of the said ordinance of December 5th, 1889, so far as the same embrace and cover the right of way for railroad tracks on all streets and alleys between Douglass street in Sioux City East Addition, and Division street in Central Sioux City, and all rights possessed under and by virtue of said ordinance to said Chicago, Milwaukee and St. Paul Railway Company and said contract made with said railway company as fully as the same are now possessed by and vested in the said Sioux City and Northern Railroad Company to the same extent and same effect as if the original grant had been made in the said ordinances and the said contract to the said Sioux City Terminal Railroad and Warehouse Company, its successors, lessees and assigns, and the said Sioux City Terminal Railroad and Warehouse Company, in consideration of

the premises, hereby covenants, promises and agrees to keep and perform all the conditions in the said ordinances and said contract contained, and to construct, equip, operate and maintain the said railroad authorized by the said ordinances to be constructed.

In witness whereof, the Sioux City and Northern Railroad Company have caused these presents to be executed by its president and attested by its secretary, with the seal of the said company hereto affixed this 13th day of December, 1889.

(Signed) THE SIOUX CITY & NORTHERN RAILROAD CO.

[Seal] By T. P. GERE, President.

Attest: F. C. HILLS, Secretary.

State of Iowa,
Woodbury County—ss.

On this 13th day of December, 1889, before me, C. L. Wright, a notary public in and for said county, personally came T. P. Gere and F. C. Hills, president and secretary respectively of the Sioux City and Northern Railroad Company, and personally to me known to be such officers and acknowledged the execution of the foregoing instrument to be their voluntary act and deed and the voluntary act and deed of said company, by them as such officers thereunto duly authorized and appointed.

Witness my hand and notarial seal on the day and year last above written.

[Seal] C. L. WRIGHT,
Notary Public in and for Woodbury County, Iowa.

179 D. L. Plumer, of lawful age, a witness produced primarily on behalf of E. H. Hubbard, trustee, with the privilege, under the stipulation of his evidence being used by any of the parties to this action, other than the Trust Company of North America, after being duly sworn by Mamie E. Brooks, Commissioner, testified as follows:

Examination.

Examined by H. J. Taylor, of Spalding, Taylor & Burgess.

Q. Your name is D. L. Plumer?

A. Yes, sir.

Q. You are the president of the Sioux City Terminal Railroad & Warehouse Company?

A. Yes, sir.

Q. I will ask you to examine the book I hand you marked Exhibit "5" for identification, and you may state whether that is

the record book of the Sioux City Terminal Railroad & Warehouse Company?

A. Yes sir, it is.

Mr. Taylor offers in evidence pages 80 to 110 inclusive, as Exhibit "5."

Q. You were a director of the Terminal Company and present at these meetings?

A. Yes, sir.

Q. And to the best of your recollection these records represent what was done by the Terminal Company at these meetings?

A. Yes, sir.

Q. There are certain notices referred to in there as having been served on the Sioux City & Northern Railroad and on the receivers of the Sioux City & Northern Railroad. I will ask you if these are two of them?

A. Yes, sir.

Q. Are those two of the notices?

A. Yes, sir.

Q. Did you personally serve these?

A. I did.

Q. Upon the receivers of the Sioux City & Northern Railroad and upon the Sioux City & Northern Railroad by serving upon its president?

A. Yes, sir.

Q. At the times indicated in the minutes that have been offered in evidence?

A. Yes, sir.

Q. I will ask you to examine Exhibit "8" purporting to be a deed from the Sioux City Terminal Railroad and Warehouse Company to E. H. Hubbard, trustee and ask if that is the original deed executed and delivered by the Terminal Company to Mr. Hubbard?

A. Yes, sir, that is the original deed.

Mr. Taylor offers Exhibit "8" in evidence, as also Exhibit "6" and "7."

Q. The recitals in these minutes represent the acts that were done at the times and in the manner therein stated?

A. Yes sir.

By agreement, the right to object to the testimony on
180 the grounds of immateriality and incompetency and irrelevancy are reserved until the final hearing.

Q. I understand that you were present at all of these meetings of the Terminal Company recited in the evidence that we have offered from the records?

A. Yes sir.

Q. And I understand that you are the party who personally served the notices recited in there?

A. Yes sir.

Q. And you have personal knowledge of the facts recited as placed on these records, pages 80 to 110 inclusive?

A. Yes sir.

Q. And these records correctly recite the facts as they existed and took place?

A. Yes sir.

Pages 1 to 71 of Terminal Record Book, referred to in the foregoing evidence.

At a meeting of the organizers of the Sioux City Terminal Railroad and Warehouse Company, on the 16th day of September, 1889 the following Articles of Incorporation were adopted and executed, to wit:

Articles of Incorporation of the Sioux City Terminal Railroad and Warehouse Company.

We A. S. Garretson, T. P. Gere and D. E. Paullin, all of Sioux City Iowa, whose names are hereto subscribed, associate ourselves together and become incorporated under the laws of the State of Iowa, and adopt the following articles of incorporation.

Art. 1st. The corporate name of this company is The Sioux City Terminal Railroad and Warehouse Company.

Art. 2nd. The office and principal place of business of this Company shall be at Sioux City, Iowa.

Art. 3rd. This company shall have power to construct operate and maintain one or more lines of railway within the corporate limits of Sioux City Iowa, with all needed side-tracks, *depots* yards, warehouses, storage-houses, elevators, and all other needed terminal facilities and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, and to hold, use and control over same, and shall have the power to construct, operate and control one or more lines of railway from the depots and yards of the said company in Sioux City—one to run in an easterly direction to the east line of Woodbury County, Iowa; one to run in a westerly direction to the Big Sioux River, and one in a northerly direction to the Iowa State line, and shall have power to lease grounds and buildings to purchase and hold all needed grounds, for the use and purposes of said company, and to

mortgage lease or sell the said grounds and improvements thereon.

Art. 4. The authorized capital stock of this company is one million dollars, divided into shares of one hundred dollars each, but the company may commence business when two hundred thousand dollars of said capital stock has been subscribed.

Art. 5. The paid-up capital stock of this company
181 may be increased from time to time up to the amount of the authorized capital as the wants and needs of the company may require upon a vote of a majority of the directors of said company at any regular meeting of the board.

Art. 6. The annual meeting of the stockholders of this company shall be held at the office of the company at Sioux City Iowa, on the third Monday in January in each year at two o'clock P. M. on said day.

Art. 7. At said meeting of the stockholders they shall elect from their own number a board of directors consisting of five members, who shall manage the business of the corporation and hold their offices for one year and until their successors are elected and qualified, and shall transact such other business as may properly come before the stockholders' meeting.

Art. 8. At all meetings of the stockholders of this company each stockholder shall be entitled to one vote for each share of stock by him held and owned and at all such meetings the stock of the said company may be voted by proxy duly authorized in writing so to do.

Art. 9. The officers of this company shall consist of a president, vice-president, secretary and treasurer, who shall have an exercise of the powers and perform the duties usually exercised and performed by such officers.

Art. 10. The directors elected at the annual meeting of the stockholders shall meet and organize immediately after the annual election on the third Monday in (of) January in each year at the office of the company in Sioux City Iowa, at four o'clock P. M. on said day, and shall elect from their own number a president and vice-president and shall also elect a secretary and treasurer, who need not be chosen from the members of the board of directors. The officers so chosen shall hold their respective offices for one year and until their successors are elected and qualified.

Art. 11. A board of directors shall hold such other meetings at such times as it may designate as the business of the

company may require, and shall fill all vacancies that may occur in the board.

Art. 12. Until the annual election on the third day of January 1890, the affairs of this company shall be [manages] by a provisional board of directors, said board shall consist of A. S. Garretson, T. P. Gere, and D. E. Paullin, which board shall have and exercise all the powers and perform the duties of the regular board of directors until the regular board of directors are elected. A. S. Garretson shall be the president, T. P. Gere the vice-president and D. E. Paullin the secretary and A. S. Garretson the treasurer of this company, who shall each hold their respective offices until their successors are elected as herein provided.

Art. 13. The highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid up capital stock of said company aside from the indebtedness secured by mortgage upon the real estate of the company.

Art. 14. The private property of the stockholders shall not be liable for the payment of the corporate debts.

Art. 15. This company may commence business as soon as these articles of incorporation are properly executed and filed with the Recorder of Woodbury County, Iowa and shall continue for thirty years with power of renewal unless sooner dissolved by the members thereof as by law provided.

Art. 16. These Articles of Incorporation may be amended at any time by a majority vote of the stockholders of this company at any annual meeting or at a special meeting of the stockholders called by order of the board of directors of which meeting and proposed amendment thirty days notice shall be given by publication for four consecutive weeks in some newspaper of general circulation in Sioux City,
182 Iowa.

In testimony whereof, we have hereunto set our hands this 16th day of Sept. A. D. 1889.

(Signed) A. S. GARRETSON.
T. P. GERE.
D. E. PAULLIN.

State of Iowa,
Woodbury County—ss.

On this 16th day of Sept. A. D. 1889, before me A. L. Hudson, a notary public in and for said county and State personally came A. S. Garretson, T. P. Gere and D. E. Paullin, each

personally to me known to be the identical persons who signed his name to the foregoing articles of incorporation and each acknowledged the execution of the same to be his voluntary act and deed for the purposes therein expressed.

Witness my hand and notarial seal, the day and year above written.

[Seal] A. L. HUDSON,
Notary Public in and for said County and State.

Now on the same day at a meeting of the provisional board of said company, A. S. Garretson, T. P. Gere and D. E. Paullin being present, the president and secretary of said company were instructed to perfect the organization of said company by filing the articles of incorporation with the Recorder of Deeds of Woodbury County, Iowa, and with the Secretary of State of Iowa, and by publishing the notice required by law.

A. S. GARRETSON, President.

Attest, D. E. PAULLIN, Secretary.

At a meeting of the Directors of the company on the 18" day of September 1889, all of the directors being present the following proceedings were had:

Whereas, it appears by the report of the president and secretary of the company that the articles of incorporation of the company was filed for record with the Recorder of Deeds of Woodbury County Iowa, on the 17" day of September A. D. 1889; and the company being fully authorized to transact business as a corporation under the laws of Iowa, it is

Resolved, That the stock book of the company be open for subscription of stock and that the certificates of stock shall be in the following form:

No..... Shares.....

State of Iowa,
The Sioux City Terminal Railroad & Warehouse Company, Sioux City, Iowa.

Capital stock $1,000,000. Shares $100 00/00 each.

This is to certify that ..... is the owner of ..... shares of $100 no/00 each paid-up capital stock of the Sioux City Terminal Railroad and Warehouse Company, transferable only on the books of said company in person or by attorney upon surrender of this certificate.

Witness the signatures of the president and secretary
183 of said Company with the seal of the company attached at Sioux City Iowa this .... day of.....
18—.

And whereas, the following subscriptions of stock were thereupon made to wit:

We the undersigned desiring to become stockholders of the Sioux City Terminal Railroad and Warehouse Company hereby subscribe the number of shares set opposite our names respectively to the capital stock of said corporation, such shares being of $100 no/00 each, and the amount thereof to be paid in full at the time of issuing the said stock.

A. S. Garretson,	10 shares	$1,000
A. L. Hudson,	1 share	100
D. E. Paullin,	10 shares	1,000
Boston Real Estate and Investment Company, by A. S. Garretson, President	1969 shares	196,900
T. P. Gere	10 shares	1,000
		200,000

Resolved, that the president and secretary be authorized to issue certificates of stock with the seal of the company attached for all stock subscribed.

A. S. GARRETSON, President.

Attest: D. E. PAULLIN, Secretary.

At a meeting of the directors of the company on the 13th day of December 1889, all of the directors being present it appeared from the report of the president and secretary of said company that the articles of incorporation were filed for record in the office of the Secretary of State of Iowa, on the 23rd day of October A. D. 1889, and that the notice of incorporation was published in the Sioux City Journal, a newspaper printed and published weekly at Sioux City Iowa, for four successive weeks, commencing on the 24th day of October A. D. 1889, which notice was in the following form to wit:

NOTICE OF INCORPORATION.

Notice is hereby given that the Sioux City Terminal Railroad and Warehouse Company has been duly incorporated under the laws of the State of Iowa with its principal place for transacting business at Sioux City Iowa and under the corporate name of the Sioux City Terminal Railroad and Warehouse Company; the general nature of the business to be transacted by said company is as follows, to wit:

To construct, operate and maintain one or more lines of railroad within the corporate limits of Sioux City, Iowa, with all needed side-tracks, depot yards, warehouses, elevators, storage-houses and all other needed terminal facilities, to require by purchase or condemnation all the needed grounds for right of way and depot purposes, and to hold, use and control the same and to construct, operate and control one or more lines of railroad from the depot and yards of said company in Sioux City, one to run in an easterly direction to some point upon the east line of Woodbury County, Iowa, to be hereafter determined upon and one line to run in a westerly or northwesterly direction to some point on the Big Sioux River, to be hereafter determined upon, and to lease grounds and buildings, and to purchase and hold all needed grounds for the uses and purposes of said company, and to sell, mortgage or lease the said grounds and improvements thereon. The capital stock of said company is one million dollars ($1,000,000), divided into shares of one hundred dollars ($100.00) each.

184 Provided, that said company may commence business when two hundred thousand dollars of the capital stock has been subscribed for and all the stock issued is to be paid for in cash at the time the same is so issued and the paid-up capital stock of said company may be increased from time to time up to the amount of the authorized capital as the wants and needs of the company may require, upon a vote of a majority of the directors of said company, at any regular meeting of the Board of Directors.

The time of the commencement of this corporation is the 17th day of September A. D. 1889, and the time of the termination of the same is the 17th day of September A. D. 1919. The affairs of said corporation are to be conducted by a board of five (5) directors, and the following named officers to wit: A president, vice-president, secretary and treasurer, said board of directors shall be elected on the third Monday in January in each year, hereafter at two o'clock p. m., at the annual meeting of the stockholders of said corporation to be held at that time, the said officers shall be elected by vote of said board of directors, at the meeting provided for by the articles of incorporation to be held on the third Monday in January of each year hereafter, at four o'clock p. m., such meetings to be held at the office of said company in Sioux City, Iowa and until the first annual election of directors and officers the affairs of said corporation shall be conducted by a provisional board of directors consisting of A. S. Garretson, T. P. Gere and D. E. Paullin, and by the following named officers, to wit: A. S. Gar-

retson, President; T. P. Gere, Vice-President; D. E. Paullin, Secretary; A. S. Garretson, Treasurer.

The highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company and the private property of the stockholders shall not be liable for the payment of the corporate debts.

Witness our hands and the seal of said corporation this 18th day of September A. D. 1889.

(Signed) A. S. GARRETSON, President.
(Signed) D. E. PAULLIN, Secretary.

It also appeared that two hundred thousand dollars of the stock of said company had been subscribed and stock issued therefore.

A. S. GARRETSON, President.
Attest, D. E. PAULLIN, Secretary.

At a meeting of the stockholders of the company on the 14th day of December, 1889, all of the stockholders being present, A. S. Garretson, President and D. E. Paullin, Secretary, the following resolutions were adopted by a unanimous vote:

Whereas, the Sioux City and Northern Railroad Company has acquired from the city of Sioux City the right of way through along, across, and upon certain streets, alleys and public grounds of the city of Sioux City, and the right to construct railway tracks, and operate cars propelled by steam thereon, which rights were conferred upon the Sioux City and Northern Railroad Company, its successors, lessees and assigns by ordinance of said city passed by the City Council May 29th, 1889, and approved by Jonas M. Cleland, Mayor of said city on the 7th day of June, A. D. 1889, and by ordinance passed by the said City Council December 5th, A. D. 1889, and approved by said mayor of said city on the 11th day of December, 1889, published as by law required, and

185 Whereas, the said City Council of Sioux City, Iowa, did upon the 5th day of December A. D. 1889, by ordinance duly passed and approved by the mayor of said city on the 11th day of December, 1889, and duly published, authorized and empowered the Chicago, Milwaukee & St. Paul Railway Company, to assign and transfer to the Sioux City and Northern Railroad Company the franchise and right to construct, operate and maintain a railroad track upon Second street in said city of Sioux City, which right was conferred upon said Chicago, Milwaukee and St. Paul Railroad Company by an ordinance of the city of Sioux City, and

Whereas, the Chicago, Milwaukee and St. Paul Railroad Company has contracted and stipulated to transfer to the Sioux City and Northern Railroad Company its right to the track upon said Second street in said ordinance mentioned, and

Whereas, said Sioux City and Northern Railroad Company offers to sell, assign and transfer to this company all the rights, privileges and franchises hereinbefore mentioned, above Douglass street, Sioux City East Addition, and Division street in Central Sioux City for the sum of one million dollars ($1,000,000) and as part consideration of such transfer to make and enter into a lease of the terminal facilities of this company for the period of one hundred years for an annual rental of ninety thousand dollars ($90,000) to be paid by said Sioux City and Northern Railroad Company which said rights, privileges and franchises in connection with said lease are of the value of one million dollars ($1,000,000) and

Resolved: That the Sioux City Terminal Railroad & Warehouse Company purchased from and of the Sioux City and Northern Railroad Company for the sum of one million dollars ($1,000,000) all of the rights, powers, licenses, privileges and franchises and authority granted to and possessed by said Sioux City and Northern Railroad Company in and by virtue of said ordinance of May 29, 1889 and December 5th, 1889, as fully as the same embrace and confer to right of way for the railroad tracks on all streets and alleys between Douglass street in Sioux City, East Addition and Division street, in Central Sioux City, and the right to construct, operate and maintain railroad tracks thereon and all rights possessed under and by virtue of the said ordinance granting to the Chicago, Milwaukee and St. Paul Railroad Company the right to sell and transfer to the Sioux City and Northern Railroad Company the franchise and right to construct, operate and maintain a railroad track upon Second street in said city in said ordinance mentioned, and all rights conferred under the said contract made with the Chicago, Milwaukee and St. Paul Railroad Company transferring said right to the Sioux City and Northern Railroad Company, and

Resolved, That this company make and enter into a lease with the said Sioux City and Northern Company for the period of one hundred years leasing to said Sioux City and Northern Railroad Company for the period of one hundred years from this date its railway and terminal facilities in the city of Sioux City, Iowa, including the rights and privileges and franchises so purchased as aforesaid from said Sioux City and Northern Railroad Company, and also all grounds of the company, together with all lines of railway, side-tracks, freight and passenger

depots, yards, warehouses, storage-houses, elevators and other terminal facilities constructed thereon, either now held by this company or that may hereafter be acquired by it, for the annual value of ninety thousand dollars ($90,000) to be paid by the Sioux City and Northern Railroad Company $75,000 of which and expenses of trusteeship shall be paid to the trustee in the deed of trust given by this company to secure the payment of its bonds with full power to said Sioux City and Northern Railroad Company to sub-let said terminal facilities, grounds, tracks, yards, warehouses and storage houses and elevators or any part thereof, provided that all sums paid as rental
186 on such sub-lease shall be paid directly to said trustee up to said amount of seventy-five thousand dollars ($75,000) and said expense.

And the board of directors of this company is hereby authorized, empowered and requested to purchase said rights, privileges and franchises and to make and enter into said lease and to do all acts and adopt all resolutions necessary to carry into effect the purposes of this resolution, and that the board of directors of this company are further authorized, empowered and requested to pay for all of said rights, privileges and franchises with the stock of the company, and for that purpose they are authorized, empowered and directed to transfer to the said Sioux City and Northern Railroad Company one million dollars ($1,000,000) of the paid-up stock of this company and they are authorized and empowered to do all things necessary to carry into effect the purpose of this resolution.

And also on the same day, and at the same meeting, the following resolutions were unanimously adopted:

Whereas, the Sioux City Terminal Railroad & Warehouse Company has need of the real estate hereinafter described for use in the construction of its lines of railway in the corporate limits of Sioux City, Iowa, together with all needed side tracks, passenger, freight depots, yards, warehouses storage houses, elevators and other needful terminal facilities.

Resolved: That this company purchase the following described property, to wit:

All of block twenty-six (26) excepting that part of lot seventeen (17) on the east side of Division street, all of block twenty-seven (27); all of block twenty-eight (28); all of block twenty-nine (29); all of block thirty (30); all of block thirty-one (31), excepting lots one (1), two (2), three (3), four (4), five (5) and six (6), and all of block forty-four (44), in Central Sioux City, also the east half of block thirteen (13), all of block fifteen (15), lots ten (10), eleven (11), and twelve (12), and the west half of lots two (2)

and three (3), in block seventeen (17), Middle Sioux City, and also lots one (1) and two (2) in block twenty-five (25) all of block twenty-six (26), lots two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12) in block twenty-seven (27), lots one (1), two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12) in block twenty-eight (28), and lots eight (8) and nine (9) in block twenty-nine (29), Sioux City East Addition for the aggregate sum of not to exceed one million dollars ($1,000,000).

Resolved, that the board of directors of this company are hereby authorized, empowered and directed to purchase said property for said price and to pass all necessary resolutions to effectuate said purpose.

And also at the same meeting the following resolutions were unanimously adopted:

Whereas, it is the judgment of the stockholders of this company that it is expedient to make an issue of bonds not to exceed the sum of one million two hundred and fifty thousand dollars ($1,250,000) for the purpose of completing payment upon its railroad and the purchase of necessary grounds for its lines of railway side-tracks, passenger and freight depots, yards, warehouses, storage-houses, elevators and other terminal facilities within the corporate limits of the city of Sioux City, and of completing and constructing such lines of railway side-tracks, passenger and freight depots, warehouses, yards, storage-houses, elevators and other terminal facilities, and any other lawful purpose of such company;

Resolved: That this company make and issue in the name and under the corporate seal of this company, one thousand two hundred and fifty (1,250) bonds for the sum of one thousand dollars ($1,000) each amounting in the aggregate to one million two hundred fifty thousand dollars ($1,250,000) num-
187 bered from one (1) to one thousand two hundred and fifty (1,250) inclusive, and that a mortgage dated the first day of January, 1890, be made to the Trust Company of North America of Philadelphia, Pa., as trustee, securing all the said bonds without distinction or priority one over another upon the grounds, franchises, leases rights privileges lines of railway, side-tracks, yards, warehouses, storage houses, elevators and other terminal facilities of this company within the corporate limits of the City of Sioux City and that the board of directors of this company be authorized, empowered and requested to take all necessary steps to pass all necessary resolutions for the carrying into effect the purposes of this resolution.

A. S. GARRETSON, President.

Attest: D. E. PAULLIN, Secretary.

At a meeting of the board of directors of the Sioux City Terminal Railroad and Warehouse Company held on the 14th day of December, 1889, all of the directors being present, the following resolutions were adopted by the unanimous affirmative vote:

Whereas, the following propositions from the directors of the Sioux City and Northern Railroad Company has been presented to us, to wit:

That a meeting of the board of directors of the Sioux City and Northern Railroad Company duly called and held on the thirteenth of December, 1889, there were present the following named directors, H. D. Booge, W. V. Hedges, T. P. Gere, F. C. Hills, Wm. Gordon, and C. L. Wright, President T. P. Gere in the chair.

The following resolution was read and submitted to the board:

Whereas, the City Council of Sioux City, Iowa, by an ordinance passed May 29" A. D. 1889, and approved June 7" 1889 and by ordinance passed December 5th A. D. 1889, and approved December 11" A. D. 1889, has granted to this company, its successors, lessees, and assigns, the right of way, over, along, across and upon certain streets, alleys and public grounds in the city of Sioux City and the right to construct railway tracks and operate steam railways thereon, and

Whereas, by an ordinance passed by the City Council of the city of Sioux City, the Chicago, Milwaukee and St. Paul Railway Company was authorized to transfer to this company its rights to a franchise for a certain track upon a part of Second street in said city, and said Chicago, Milwaukee and St. Paul Railway Company has stipulated to transfer to this company said track under the power given by said ordinance and

Whereas, it is for the interest of this company to procure the construction of said railway tracks on the said streets and alleys under the power granted by said ordinance and to procure for its use terminal grounds, depot grounds and other facilities, and

Whereas, the said Terminal Company has contracted and agreed to construct said railway tracks and to provide terminal grounds and construct said depot buildings and other facilities on grounds adjacent to said tracks and to issue and deliver its paid-up stock to the amount of one million dollars ($1,000,000) to this company in payment of the assignment and transfer hereinafter authorized, now therefore it is

Resolved: That the President and Secretary of this company is hereby authorized to transfer, assign, sell and convey unto the party of the second part all the rights, powers, privileges, licenses, franchises and authority to and possessed by the said party of the first part under and by virtue of said ordinances of May 29", 1889, and under and by virtue of said ordinance of December 5th, 1889, so far as the same embraces and covers the right of way and franchises for railroad tracks
188 in the city of Sioux City, between Douglass street in Sioux City East Addition and Division street in Central Sioux City, or possessed by under and by virtue of said ordinance to said Chicago, Milwaukee & St. Paul Railway Company, and the contract made in pursuance thereof as fully as the same are now possessed by vested in this company to the same extent and the same effect as if the original grant had been made in said ordinance and contract to the said Sioux City Terminal Railroad & Warehouse Company, its successors, lessees and assigns, and on condition that the said Sioux City Terminal Railroad & Warehouse Company shall keep and perform all the conditions in said ordinance and contract contained, and this company to receive in payment of this transfer and assignment one million dollars ($1,000,000) in paid-up stock of said Terminal Company.

The foregoing resolution having ben read it is moved that the same be adopted and the same being put to a vote of the directors was carried by the affirmative vote of all of said board.

And the following resolution was thereupon presented and read to the board:

Whereas, the Sioux City Terminal Railroad and Warehouse Company a corporation of this State is the owner of a large amount of real estate in the City of Sioux City purchased by it for the erection of depots, warehouses, terminal stations, railroad tracks and other facilities for the operation of railways and other improvements appurtenant thereto, a list of which real estate is this day filed with this company, and

Whereas, the said Sioux City Terminal Railroad and Warehouse Company is also owner of and possessed of certain franchises in the City of Sioux City for the right of way for railroad purposes over certain streets alleys and public grounds in said city between Douglass Street in Sioux City East Addition and Division Street in Central Sioux City as shown by ordinances passed by the City Council of the City of Sioux City on May 29th 1889, and December 5th, 1889, to this company and also to certain rights acquired by this com-

pany by contract from the Chicago Milwaukee and St. Paul Railway Company, for a certain track on Second Street in said city, which rights and franchises have heretofore been assigned by this company to the said Sioux City Terminal Railroad and Warehouse Company, and

Whereas, it is important and desirable for this company in order to procure the use of the Terminal grounds, depots and other stations in said city to lease from said Sioux City Terminal Railroad and Warehouse Company said lands, lots, rights of way, and franchises so owned and possessed by said Terminal Railroad and Warehouse Company, therefore it is

Resolved, that the President and Secretary of this company be and they are hereby authorized to execute and sign a lease for and in behalf of this company for all the said property of the said Terminal Company including all its tracks depots terminal grounds and other facilities now or hereafter constructed and including said franchises and rights of way for a period of one hundred years (100) at an annual rental of ninety thousand dollars ($90,000) payable quarterly and seventy-five thousand dollars ($75,000) of which and the expenses of the trustee to be payable at the office of the Trust Company of North America of Philadelphia trustee and to provide in said lease that this company shall maintain all improvements of every kind and nature upon the grounds of said Terminal Company and operate the tracks located upon and to have full control of said tracks and improvements during the existence of said lease as long as said rental is paid with right upon the part of this company to sub-let any part of said grounds or tracks to other railroad companies and the said President and Secretary shall have full power to incorporate in said lease all of the terms and conditions necessary to
189 carry the spirit of this resolution into effect.

It was moved that the foregoing resolution be adopted which being duly seconded the same was put to a vote and carried by the affirmative vote of all of said board, and

Whereas, it is deemed advisable for the best interests of the Sioux City Terminal Railroad and Warehouse Company to except and ratify the foregoing proposition and agreement the following preamble and resolutions are unanimously adopted:

Whereas, The Sioux City and Northern Railroad Company has acquired from the City of Sioux City the right of way through, along, across and upon certain streets, alleys, pub-

lic grounds of the City of Sioux City, and the right to construct railroad tracks and operate cars propelled by steam thereon which rights were conferred upon the Sioux City and Northern Railroad Company its successors lessees and assigns by ordinance of said City passed by the City Council May 29, 1889 and approved by Jonas M. Cleland Mayor of said City on the 7th day of June 1889, and by ordinance passed by the said City Council December 5th, 1889 and approved by said Mayor of said city on the 11th day of December 1889, and published as by law required and,

Whereas, the said City Council of Sioux City, Iowa, did upon the 5th day of December 1889, by ordinance duly passed, and approved by the mayor of said city on the 11th day of December 1889, and duly published, authorized and empowered the Chicago Milwaukee & St. Paul Railway Company to assign and transfer to the said Sioux City and Northern Railroad Company the franchise and right to construct, operate and maintain a railroad track upon Second Street in said City of Sioux City, which right was conferred upon said Chicago, Milwauke and St. Paul Railroad Company by an ordinance of the City of Sioux City, and

Whereas, The Chicago Milwaukee and St. Paul Railroad Company has contracted and stipulated to transfer to the Sioux City and Northern Railroad Company its right to the track upon said Second Street in said ordinance mentioned, and

Whereas, said Sioux City and Northern Railroad Company offers to sell assign and transfer to this company all the rights privileges and franchises hereinbefore mentioned between Douglass Street in Sioux City East Addition and Division Street in Central Sioux City for the sum of one million dollars ($1,000,000) and as part consideration of such transfer to make and enter into a lease of the terminal facilities of this company for the period of one hundred years (100) for the annual rental of ninety thousand dollars ($90,000), to be paid by said Sioux City and Northern Railroad Company which said rights privileges and franchises in connection with said lease are of the value of one million dollars ($1,000,000) and

Whereas, Said City Council of Sioux City Iowa did upon the 26th day of December 1889, by ordinance duly passed and approved by the Mayor of said city on the 27th day of December 1889, and duly published, authorized and empowered the Sioux City & Northern Railroad Company to assign transfer sell and convey unto the Sioux City Terminal Railroad and Warehouse Company all the franchises and privileges and

grants acquired by the said Sioux City and Northern Railroad Company under the said ordinances of May 29, A. D. 1889 and December 5th, 1889, over, across, along, and upon the certain streets, alleys, public grounds in the City of Sioux City, between Division Street in Central Sioux City and the East side of Douglass Street Sioux City East Addition mentioned in said ordinances excepting only so much thereof as is embraced in the right of way for track on the north side of Second Street between the East side of Lafayette Street in Central Sioux City and the west side of Nebraska Street in Sioux City East Addition which said last named excepted
190 track the said Sioux City and Northern Railroad Company has been authorized to transfer and convey to the Chicago Milwaukee and St. Paul Railroad Company with all the rights and power by the said ordinances granted and conveyed, and

Whereas, The stockholders of this company by resolution this day passed have authorized empowered and requested the board of directors of this company to purchase the said rights privileges and franchises, and make and enter into said lease;

Resolved: That the Sioux City Terminal Railroad and Warehouse Company purchase from and of the Sioux City and Northern Railroad Company for the sum of one million dollars ($1,000,000) all the rights, powers, licenses privileges and franchises and authority granted to and possessed by said Sioux City and Northern Railroad Company in and by virtue of said ordinances of May 29 1889, and December 5th 1889, as fully as the same embrace and confer the right of way for railroad tracks on all streets and alleys between Douglass Street in Sioux City East Addition and Division Street in Central Sioux City and the right to construct operate and maintain railroad tracks thereon and all rights possessed under and by virtue of said ordinance granting to the Chicago Milwaukee and St. Paul Railroad Company the right to sell and transfer to the Sioux City and Northern Railroad Company the franchise and right to construct operate and maintain a railroad track upon Second Street in said City in said ordinance mentioned and all rights conferred under the said contract made with the Chicago Milwaukee and St. Paul Railroad Company transferring said right to the Sioux City and Northern Railroad Company, and

Resolved: That this company make and enter into a lease with said Sioux City and Northern Railroad Company for the period of one hundred years (100) leasing to said Sioux City and Northern Railroad Company for the period of one hundred (100) years from this date its railway and terminal facilities

in the City of Sioux City Iowa, including the rights privileges and franchises so purchased as aforesaid from the Sioux City and Northern Railroad Company and also all grounds of this company together with all lines of railway side-tracks, freight and passenger depots yards warehouses storage houses, elevators and other terminal facilities constructed thereon, either now held by this company or that may hereafter be acquired by it for the annual rental of ninety thousand dollars ($90,000), to be paid by the said Sioux City and Northern Railroad Company, seventy-five thousand dollars ($75,000) of which and expense of trusteeship shall be paid to the trustee in the deed of trust given by this company to secure the payments of its bonds with full power to said Sioux City and Northern Railroad Company to sub-let said terminal facilities grounds, tracks, yards, warehouses storage houses, elevators or any part thereof provided that all sums paid as rental on such sub-lease shall be paid directly to said trustee up to said amount of seventy-five thousand dollars ($75,000) and said expenses;

And the president and secretary of this company are hereby authorized empowered and directed to make the said purchase for this company in accordance with this resolution and to execute all necessary papers in that behalf and to make and execute said lease to the Sioux City and Northern Railroad Company hereby given to said President and Secretary full power to make and execute all necessary papers for carrying into effect the purposes of this resolution it is also

Resolved, that the president and secretary of this company are hereby authorized empowered and directed to make the said purchase for this company and to that end to issue to the said Sioux City and Northern Railroad Company eight hundred thousand dollars ($800,000) of the paid up stock of said company and to procure and transfer or cause to be transferred an additional of two hundred thousand dollars
191 ($200,000 of the paid-up stock of this company and the president and secretary are hereby authorized empowered and directed to do all things necessary for carrying into effect the purpose of this resolution, and on the same day and at the same meeting the president and secretary reported the execution of the preceding resolutions and reported the execution of the lease in the following form, to wit:

This indenture made this 14th day of December A. D. 1889, by and between the Sioux City Terminal Railroad and Warehouse Company, of Sioux City, Iowa, hereinafter denominated The Terminal Company, party of the first part, and the Sioux

City and Northern Railroad Company of Sioux City Iowa, hereinafter denominated the Railroad Company party of the second part, witnesseth:

Whereas, the said Terminal Company a corporation of the State of Iowa, is the owner of the real estate hereinafter described and has been organized with power and authority to construct operate maintain own or lease one or more lines of railway within the corporate limits of the City of Sioux City with all needed side-tracks passenger and freight depots yards and warehouses and all other needed facilities and to acquire all needed grounds for right of way tracks and depot purposes, side-tracks, wood and water stations and to hold, use control and lease the same and with other powers in said articles of incorporation as by the statutes of the State of Iowa provided, and

Whereas, the City Council of the City of Sioux City did on the 29th day of May 1889 and on the 5th dayof June 1889, by ordinances grant unto the said railroad company party of the second part, its lessees and assigns the right of way over, along, upon and across certain streets, alleys and public grounds of the City of Sioux City, and the right to construct railway tracks and operate steam cars thereon which ordinances were duly approved by the mayor of said city, on the 7th day of June 1889, and the 11th day of December 1889, respectively, and

Whereas, The City Council of the City of Sioux City did upon the 5th day of December 1889, by ordinance duly passed and approved by the mayor of said city on the 11th day of December 1889, and duly published authorized and empowered the Chicago Milwaukee and St. Paul Railroad Company to assign and transfer to the Sioux City and Northern Railroad Company its lessees and assigns the franchise and right to operate and maintain a railroad track upon Second Street in said City of Sioux City between Lafayette Street in Central Sioux City and Nebraska Street in Sioux City East Addition which right had been conferred upon the Chicago Milwaukee and St. Paul Railroad Company, by ordinance of the City of Sioux City and which right this said Chicago Milwaukee and St. Paul Railroad Company has heretofore contracted to and transferred to the Sioux City and Northern Railway Company its lessees and assigns, and

Whereas, The said Railroad Company party of the second part by deed of assignment dated the 14th day of December 1889, granted assigned transferred and set over to the said Terminal Company party of the first part all the rights, pow-

ers, permissions privileges and authority granted and conferred by said ordinances for said railroad tracks between Division Street Central Sioux City and the east side of Douglass Street in Sioux City East Addition and the said transfer from the Chicago Milwaukee and St. Paul Railway Company for said track on Second Street aforesaid to be held used exercised and enjoyed by the said Terminal Company party of the first part and as fully as if the same were possessed by and vested in the Sioux City and Northern Railroad Company and

Whereas, The said Terminal Company party of the first part has been vested with power by its stockholders and board of directors to execute and deliver its first mortgage to the Trust Company of North America, Philadelphia, Pa., 192 to secure an issue of bonds to an amount not exceeding one million two hundred and fifty thousand dollars ($1,250,000) which mortgage is to cover embrace and include all of the real estate of said company and all the rights of way, franchises and all rights required or to be acquired under or by virtue of the said ordinances assignments transfers aforesaid, and

Whereas, it is further provided in the said mortgage under said power as aforesaid that so much rental in this lease provided as shall be necessary to pay the interest upon said bonds and the necessary costs of trusteeship shall be paid in quarterly installments to the trustee in said mortgage named and

Whereas, the said Sioux City Terminal Railroad and Warehouse Company and the Sioux City & Northern Railroad Company have each been duly authorized and empowered by resolutions of the stockholders and board of directors of the said respective companies to execute and deliver these presents, and the same has been in all respects approved, and the officers of said companies duly authorized to execute the same;

Now therefore the party of the first part and the said Terminal Company in consideration of the covenants and agreements of the party of the second part hereinafter set forth do by these presents lease and rent to the party of the second part the following described property, to wit:

All of block twenty-six (26); all of block twenty-seven (27); all of block twenty-eight (28); all of block twenty-nine (29); all of block thirty (30); all of block forty-four (44); lots seven (7) to sixteen (16), inclusive in block thirty-one (31), all in Central Sioux City; the east half of block thirteen (13); all of block fifteen (15) lots ten, eleven, and twelve (10, 11 & 12) and west one third of lots two (2) and three (3), in block seventeen (17), all in Middle Sioux City; lots one (1) and two (2) in block twenty-five

(25), all of block twenty-six (26), lots two, three, four, five, six, ...ten, eleven and twelve, (2, 3, 4, 5, 6,.....10, 11 & 12) in block twenty-seven (27), lots one, two, three, four, five, six, eight, nine, ten, eleven, twelve (1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12) in block twenty-eight (28), lots eight, nine (8 & 9) in block twenty-nine (29) all in Sioux City, east addition, together with all buildings and improvements thereon or that hereafter may be erected thereon, and all railway lines, side tracks, yards, passenger and freight depots, warehouses, storage houses, elevators and other terminal facilities, now thereon or that may hereafter be erected thereon, also all rights, privileges, franchises and rights of way of every kind or nature whatsoever held by this company or that hereafter may be acquired by it including all rights and franchises acquired by it under and by virtue of the ordinances and contracts aforesaid, so transferred to it, the purpose being hereby to lease to the said party of the second part all of the property rights of way, franchises and improvements now or hereafter owned by the said party of the first part in Sioux City, Iowa, and all property rights and hereditaments that may be acquired by this company within the corporate limits of the city of Sioux City, Iowa, all of the above described property being in the county of Woodbury and State of Iowa to have and to hold the same to the party of the second part, subject to the conditions hereinafter stated from the 14th day of December, 1889, to the 14th day of December, 1989, and the party of the second part in consideration of the covenants and agreements, in the lease to the premises above set forth, covenants and agrees with the party of the first part to pay to the party of the first part as rent for the same the annual rental of ninety thousand dollars ($90,000) payable quarterly and the said party of the second part agrees to pay of said rental seventy-five thousand dollars ($75,000) thereof, to the Trust Company of North America, of Philadelphia, Pa., to apply on the in-
193 terest of the bonds issued by said Terminal Company and secured by said mortgage given to said Trust Company of North America, of Philadelphia, Pa., hereinbefore referred to and such other portion of ninety thousand dollars ($90,000) as shall be necessary to pay the expenses of the trusteeship of said trustee before mentioned.

And it is further agreed that the party of the second part shall have full right, power and authority to sub-let any portion of said real estate improvements, depots, warehouses, elevators, terminal facilities, tracks, side-tracks, and any other property included in this lease to any other corporation or person, and the rental therefor shall be payable to said party of the second part so long as there shall be no default in the payment of the rental herein provided for, or no default in the payment

of the interest or principal of the bonds given by said Terminal Company and secured by said mortgage to the Trust Company of North America, of Philadelphia, Pa., but it is further understood and agreed that if there shall be any default in the payment of the rental herein provided for to the party of the first part or in case there should be any default in the payment of the interest or principal in said bonds, issued by said Terminal Company and secured by said mortgage to said Trust Company of North America of Philadelphia, Pa., than said rental so due, or to become due from such corporations or persons sub-leasing any portion of said real estate, terminal grounds, terminal facilities or tracks, or buildings, shall be payable to the said trustee named in said mortgage given by said terminal company aforesaid and the same to be held and applied by the said trustee to the payment of the interest on said bonds aforesaid, and the said trustee shall have all the remedies given by law or by virtue of said sub-leases by way of distress or otherwise to enforce the collections of said rents and the said party of the first part covenants with the party of the second part that during the continuance of said lease they will keep and maintain the said improvements, tracks and buildings now or hereafter placed upon said premises in as good repair as the same now are or at any time shall be placed by the party of the first part, damage by superior force inevitable necessity or fire from any other cause and carelessness of the said lessee excepted, and at the expiration of the term of said lease or forfeiture thereof, they will yield up said premises and property to the party of the first part without further notice in as good condition as when the same was entered upon by the party of the second part or constructed by said party of the first part, loss by fire or inevitable accident, ordinary wear and tear excepted.

It is further expressly agreed between the parties hereto that if default shall be made in the payment of the rent above reserved or any part thereof or any of the covenants herein contained to be kept by the party of the second part, and such default shall continue for a period of thirty (30) days it shall be lawful for the party of the first part or its legal representatives to enter into and upon said premises and property or any part thereof either with or without process of law and [repossed] the same at the election of the party of the first part, and to distrain for any rent that may be due thereon upon any property belonging to the party of the second part, and in order to enforce a forfeiture for non-payment of rent it shall not be necessary to make a demand on the same day the rent shall become due, but a failure to pay the same at the place aforesaid or a demand and refusal to pay on the same day or at any time or any subsequent day, shall be sufficient and after such default shall be

made the party of the second part, shall be deemed guilty of forcible detainer of the said premises under the statute and in case of such forfeiture it is further understood that all sub-leases or contracts for the use of any of said premises and franchises or grounds or right of way or any parts thereof as may be made by the party of the second part under the power herein given shall inure in case of default of said second
194 party to the benefit of the party of the first part and the said trustee under the mortgage aforesaid, given by said party of the first part or the purchasers if any that may hold title under said mortgage by judicial sale or otherwise, shall have and be clothed with all the rights, power authority and discretion which by the terms of said leases, sub-leases or contracts are vested in the party of the first part and shall be entitled to all the remedies which are reserved or granted to the lessor by or under said leases sub-leases or contracts for the recovery of any moneys due thereon as rental or otherwise, and for the enforcement in every respect of the rights of the lessor or party of the first part.

In witness whereof the parties hereto have caused these presents to be signed by the president and secretary respectively of said companies on the day and year last above written.

(Signed) ....., President.
(Signed) ....., Secretary.
(Signed) ....., President.
(Signed) ....., Secretary.

State of Iowa,
Woodbury County—ss.

On this ..... day of ..... A. D. 188 before me .... a notary public in and for said county and state, personally came T. P. Gere and F. C. Hills, personally to me known to be the President and Secretary respectively of the Sioux City and Northern Railroad Company, party of the second part in the foregoing instrument, and also personally appeared .... and ..... President and Secretary, respectively of the Sioux City Terminal Railroad & Warehouse Company, personally to me known to be such officers of said company and acknowledged the execution of the foregoing instrument to be the voluntary act and deed of said respective companies by them as such officers thereto duly appointed and authorized.

Witness my hand and notarial seal on the day and year last above written.

....., Notary Public
In and for Woodbury County, Iowa.

It is therefore,

Resolved, that the acts of the president and secretary in executing said lease are hereby approved, ratified and confirmed.

And on the same day and at the same meeting the following preamble and resolutions were unanimously adopted:

Whereas, the Sioux City Terminal Railroad and Warehouse Company has need of the real estate hereinafter described for use in the construction of its lines of railway in the corporate limits of Sioux City, Iowa, together with all needed side-tracks, passenger and freight depots yards, warehouses and storage houses, elevators, and other needful facilities, and

Whereas, the board of directors of this company has this day been authorized, empowered and directed by resolution of the stockholders of this company to purchase said property for said price, and to pass all necessary resolution to effectuate said purpose.

Resolved, that this company purchase the following described property, to wit:

All of block twenty-six (26); all of block twenty-seven (27); all of block twenty-eight (28); all of block twenty-nine (29); all of block thirty (30), excepting lots one (1), two (2), three (3), four (4), five (5) and six (6), all of block forty-four (44) in Central Sioux City, also the east half of block thirteen (13), all of block fifteen (15), lots (10, 11, 12) ten, eleven & twelve, and the west half of lots two & three (2 & 3), in block seventeen (17) Middle Sioux City and also lots one and two (1 & 2) in block twenty-five (25); all of block twenty-six (26), lots two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12) in block twenty-seven (27), lots one (1), two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12), in block twenty-eight (28), and lots eight (8) and nine (9), in block twenty-nine (29), Sioux City East Addition for the aggregate sum of not to exceed one million dollars ($1,000,000) and that the president and secretary of this company are hereby authorized empowered and directed to execute all necessary contracts orders and other papers necessary to the completion of such purpose and the payment for said property and the treasurer of this company is hereby directed to pay such amount for the purchase of said property upon the orders of said president and secretary.

195

And also on the same day and at the same meeting the following preamble and resolutions were unanimously adopted by the affirmative vote of all the directors.

Whereas, it is the judgment of the board of directors that it is expedient to make an issue of bonds in the aggregate not

to exceed the sum of one million two hundred and fifty thousand dollars ($1,250,000) for the purpose of completing the payments upon its railroad and the purchase of necessary grounds for its lines of railway, side-tracks, passenger and freight depots yards, ware-houses, storage-houses, elevators and other terminal facilities within the corporate limits of the City of Sioux City and of building and constructing such lines of railway side tracks passenger and freight depots, yards ware-houses, storage-houses elevators and other terminal facilities and for the other lawful purposes of said company.

Resolved: That this company make and issue in the name and under the corporate seal of this company, one thousand two hundred and fifty thousand (1250) bonds for the sum of one thousand dollars ($1,000) each amounting in the aggregate to one million two hundred and fifty thousand dollars ($1,250,000) numbered from one (1) to one thousand two hundred and fifty (1250) inclusive which bonds shall be in general form and substance as follows:

No..... No.....

$1,000

United States of America, State of Iowa.

The Sioux City Terminal Railroad and Warehouse Company promises to pay to the holder of this bond on the first day of January nineteen hundred (1900) at the office of the Trust Company of North America of Philadelphia, Pa., one thousand dollars ($1,000) United States gold coin of or equal to the present standard of weight and fineness and interest thereon in the meantime at the rate of 6 per cent per annum, payable at the same place in like gold coin semi-annually on the first day of July and on the first day of January in each year upon presentation and surrender of the annexed coupons therefore as they severally mature free from all United States, State and Municipal taxes that may be required by law to be deducted by said company from said interest the company hereby assuming to pay the same.

This bond is one of the series of bonds not exceeding in the aggregate one million two hundred and fifty thousand dollars ($1,250,000) and is secured by a mortgage or deed of trust duly made and delivered by the said company to the
196 Trust Company of North America trustee, for the holders of all of said bonds which said mortgage is a first lien upon the real estate and improvements of the said Terminal Railroad and Warehouse Company with the appurtenances and improvements thereon or to be placed and directed thereon and all leases rights privileges and franchises held by this company.

This bond shall pass by delivery or by transfer on the books of the trustee but after registration of the ownership no transfer except on the books of the trustee shall be vaild unless the last transfer be to bearer and this bond shall continue subject to successive registration and transfers to bearer at the option of the holder.

This bond or any bond purporting to be secured by said deed of trust shall not be collected or valid for any purpose unless certified by the said trustee.

In witness whereof the said Terminal Railroad and Warehouse Company has hereunto affixed its corporate seal and caused these presents to be signed by its president and secretary at Sioux City Iowa, this first day of January 1890.

....., President.

(Corporate Seal.) ....., Secretary.

FORM OF COUPONS.

$30 No.....

On the first day of July .....the Sioux City Terminal Railroad and Warehouse Company will pay to the bearer at the office of the Trust Company of North America in Philadelphia, Pennsylvania, thirty dollars United States Gold Coin being six months' interest due that date on its first mortgage bond.

No..... ....., Secretary.

FORM OF TRUSTEE'S CERTIFICATE.

It is hereby certified that this bond is one of the bonds described in the mortgage deed of trust herein mentioned.

THE TRUST COMPANY OF NORTH AMERICA,
Trustee.
By....., President.

Resolved: That a mortgage dated the first day of January 1890 be made to the Trust Company of North America as trustee securing all the said bonds without distinction or priority of one over the other upon the grounds rights franchises privileges leases lines of railway side-tracks, passenger and freight depots yards warehouses storage houses and all other needful terminal facilities of this company within the corporate limits of the city of Sioux City either now held by this company or which it may hereafter require and the president and secretary of this company are hereby authorized empowered and directed to make and execute the said bonds and the

said mortgage and to take all necessary steps and execute all necessary papers of the issuing and disposing of said bonds.

Said mortgage securing said bonds shall be made substantially in the following form:

Now this indenture witnesseth that the said Sioux City Terminal Railroad and Warehouse Company, for the better securing the payment of the principal and interest of the aforesaid bonds has granted, bargained sold transferred and conveyed to the said The Trust Company of North America, trustee all and singular the following described property situated in Woodbury County, Iowa, and within the corporate limits of the City of Sioux City, Iowa, to wit:

197 All of block twenty-six (26) all of block twenty-seven (27) all of block twenty-eight (28) all of block twenty-nine (29) all of block thirty (30) all of block thirty-one (31) except lots one (1) two (2) three (3) four (4) five (5) and six (6) and all of block forty-four (44) in Central Sioux City also the east half of block thirteen (13) all of block fifteen (15) lots ten (10) eleven (11) and twelve (12) and the west half of lots two (2) and three (3) in block seventeen (17) Middle Sioux City.

Lots one (1) and two (2) in block twenty-five (25) all of block twenty-six (26) lots two (2) three (3) four (4) five (5) and six (6) ten (10) eleven (11) and twelve (12) in block twenty-seven (27) lots one (1) two (2) three (3) four (4) five (5) six (6) eight (8) nine (9) ten (10) eleven (11) and twelve (12) in block twenty-eight (28) lots eight (8) and nine (9) in block twenty-nine (29) Sioux City East Addition together with all buildings and improvements thereon and all railway lines, side tracks yards passenger and freight depots, warehouses, storage houses, elevators and other terminal facilities now or hereafter erected thereon also all rights privileges franchises and leases of every kind and nature whatsoever now held by this company or that may hereafter be acquired by it including the rights and franchises and the lease hereinbefore mentioned also all property rights and hereditaments of every kind [of] nature whatsoever, that may hereafter be acquired by this Company within the corporate limits of Sioux City Iowa to have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part its successors and assigns forever.

In trust, nevertheless, for the equal pro rata benefits and security of all and every the person or persons or bodies corporate who may be or become the holders of the said bonds issued under and secured by this deed of trust on mortgage or such of them as shall be issued by the party of the first part

without preference priority or distinction as to lien or otherwise of any over the others by reason of priority in time of issuing or negoiating the same or otherwise, and so that each and all of the said bonds issued and to be issued as aforesaid shall have the same right lien and privilege under and by this deed of trust and mortgage and shall all be equally secured thereby with like effect as if they had all been made executed delivered and negotiated semi-annually with the date hereof: It being intended that the lien and security of all of the said bonds shall take effect from the date of the execution and delivery of this deed of trust or mortgage whether the same shall actually be issued or sold or disposed of at such date or whether they or any part of them shall be negotiated and sold at some future date and that the lien and security of this deed of trust or mortgage and all bonds that may be issued under the same shall take effect from the date of the execution and delivery hereof as though the said bonds were upon such date actually sold and delivered to and held by innocent holders for value and the lien and security of said bonds shall in no manner be altered impaired or prejudiced by the creation of subsequent deeds of trust or mortgage by the Sioux City Terminal Railroad and Warehouse Company or by the entry or acquisition of judgments or liens in any form by creditors at any future time. And it is hereby expressly covenanted and understood by and between the parties hereto that the said above described premises, property rights privileges and franchises are to be had and holden by the said trustee upon and for the trust uses and purposes following that is to say:

First. The party of the first part shall make execute and deliver to the party of the second part bonds of the party of the first part intended to be secured hereby to the amount of one million two hundred and fifty thousand dollars
198 ($1,250,000) and the party of the second part shall forthwith certify or countersign said bonds and deliver the same to the party of the first part on the execution and delivery hereof and when bonds and obligations are countersigned or certified by the trustee to the effect that they are issued under and secured by this deed of trust or mortgage such certificate shall be conclusive evidence that said bonds or obligations have been issued in accordance with and are entitled to the security of this deed of trust or mortgage.

Second. Until default shall be made by the party of the first part in the payment of the principal or interest of such bonds or any of them according to the tenor and effect of such bonds or until default be made by the party of the first part, in respect to some act or thing in any of such bonds or herein

required to be done the party of the first part, its successors and assigns shall possess, manage, operate use and enjoy the premises property terminal facilities and railway and its appurtenances hereby mortgaged and take and use the rents income profits thereof as if this indenture had not been made and on payment in full of all the bonds hereunder issued all interest and estate hereby vested in the party of the second part shall cease and all the premises and property hereby conveyed shall be surrendered and delivered to the party of the first part who shall hold and possess the same as if this instrument had not been executed.

Third. It is further understood and agreed that all grants leases and contracts for the use of the premises and franchises hereby mortgaged or any part thereof or of the railroad or terminal facilities upon the premises and property hereby mortgaged or any part thereof or grants of rights of way over the same as may hereafter be made by the party of the first part shall *ipso facto* be and become subject to the lien of this mortgage and no sale of the railroad or premises or property or franchises or any part thereof by the trustee or by judicial proceedings under this mortgage shall divest the title of such lessee or grantee under any such leases contracts or grants but the trustee and purchasers holding under it shall have and be clothed with all the rights powers authority and discretion which by the terms of such leases contracts or grants are vested in the party of the first part and shall be entitled to all the remedies which are reserved or granted to the lessors by or under said lessees contracts or grants for the recovery of the moneys agreed thereby to be paid and for the enforcement in every respect of the rights of the lessor or party of the first part and the party of the first part shall whenever required assign and transfer such leases and contracts to the said trustee to be held for the uses and trusts in this indenture set forth.

Fourth. The party of the first part agrees to pay all taxes and assessments upon the premises and property hereby granted and not to suffer any lien or attachment superior to the lien created hereby to be enforced thereon and not to commit or suffer any waste thereof and to keep and maintain the said railway and premises and property hereby mortgaged in good order and condition and to keep all its structures and insurable property hereby mortgaged well and sufficiently insured and also on being requested so to do to pay all proper charges of a trustee hereunder and all reasonable disbursements incurred by it in the performance of its duty as such trustee.

Fifth. In case default shall be made in the payment of the interest to accrue on any of said bonds and such interest shall

remain unpaid for the period of six months after demand or the party of the first part shall suffer or allow any taxes or charges to fall in arrear whereby the security of the mortgage may be impaired or shall refuse or fail to keep or perform any of the covenants and stipulations herein or in said
199 bonds contained on its part to be kept and performed the whole principal of said bonds together with all interest accrued and remaining unpaid thereon shall at the option of the said trustee become due and payable but a majority in interest of the holders of all of the said bonds then outstanding shall have the right and power by an instrument in writing under their hands to instruct and require the said trustee to exercise such option and proceed as if such principal were payable or to waive the right to do so, and also the right and power to reverse or annul the exercise of any option which shall have been made by the said trustee in the premises and the said trustee shall act accordingly.

Sixth. In case default shall be made in the payment of any interest to accrue on any of the said bonds when the same shall become payable, and such interest shall remain unpaid and in arrear for six months after it shall have been duly demanded or in case default shall be made in the payment of the principal of said bonds hereby intended to be secured or any or either of them when the same shall become due and payable according to the tenor of said bonds whether by lapse of time or default in the payment of interest or if the party of the first part shall suffer or allow any of the taxes or charges to fall in arrear whereby the security of this mortgage may be impaired or shall refuse or fail to keep or perform any of the covenants or stipulations herein or in said bonds contained on its part to be kept and performed then and in either of those cases it shall be lawful for the trustee herein and upon the written request of the holders of a majority in interest of the said bonds outstanding and an adequate indemnity being given to such trustee against all costs, expenses and liabilities to be incurred in executing this article it shall be the duty of the said trustee to enter into and upon and take possession of the railroad and property hereby conveyed or mortgaged or intended so to be, and each and every part thereof, and to hold, use manage, maintain and operate the said railroad and the business of the party of the first part, by its own managers superintendents receivers or servants to as full extent as the party of the first part may lawfully do, until the amount due for principal or interest as the case may be shall be paid or until a sale of said mortgaged premises or property shall be made as hereinafter provided, and during said period from time to time to make at the expense of the trust estate such repairs and replacements and useful alterations, exten-

sions, additions and improvements thereto as well in respect to terminal facilities rolling stock and equipment as to the said railroad and its appurtenances as may seem to said trustee judicious and proper, and to collect and receive all incomes rents, issues and profits thereof and every part thereof and after deducting the expenses of operating said railroad and property and of conducting the business of the party of the first part and of all repairs replacements, alterations, extensions, additions and improvements as aforesaid, and all taxes and assessments and other charges upon said property and premises and every part thereof as well as just and reasonable compensation for its own services, and the services of all agents, clerks and servants properly engaged or employed, including reasonable attorneys and counsel fees, then to apply the moneys arising as aforesaid to the payment without preference priority or distinction to one bond over another first of the interest due on the said bonds then outstanding and intended hereby to be secured and secondly if the principal of said bonds in full if said income and proceeds be sufficient but if not then pro rata.

Seventh. The provision of the sixth article is cumulative to the ordinary remedy by foreclosure in the courts and the trustee herein may at his discretion and shall upon the written request of the holders of a majority in value of the outstanding and unpaid bonds which may have been issued hereunder and upon being properly indemnified and whenever entitled so to do by the terms hereof institute proceedings to foreclose this mortgage whenever a majority of said bondholders may direct and in the absence of any such direction than as the said trustee may deem expedient.

Provided, always and it is expressly declared and agreed that no holder or holders of a bond or of any bonds secured hereby shall have the right to institute any suit action or proceedings in equity or in law for the foreclosure of this indenture or the execution of the trusts thereof or for the appointment of a receiver or for any other remedy without first giving notice in writing to the trustee herein of default having occurred and continued as aforesaid and unless a majority in amount of the holders of bonds then outstanding have made request in writing to the said trustee as above provided and have afforded it a reasonable opportunity to proceed to exercise the powers hereinbefore granted or to institute such action suit or proceeding in its own name and have also offered adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby and such notification request and offer of indemnity are hereby declared to be conditions precedent

for the execution of the powers and trusts of this indenture to any action or cause of action for the foreclosure or for any other remedy hereunder, and

Provided, also that neither the trustee nor the holder or holders of the bonds intended to be hereby secured or any of them shall sell the premises hereby mortgaged or intended so to be or any part thereof or institute any suit, action or procedure in law or equity for the foreclosure hereof or for the appointment of a receiver otherwise than in the manner herein provided.

Eighth. The party of the first part does hereby irrevocably waive the benefit and advantage of any or all valuation, stay appraisement redemption or extension laws and of all laws requiring deeds of trust mortgages, liens, hypothecations or other securities for moneys to be foreclosed by action, therefore now existing or which may hereafter exist, or where the said sale may take place which but for the provisions herein might prevent or postpone the sale of said premises property rights privileges and franchises, to the purchaser under the powers and upon compliance with the provisions herein provided and said party of the first part does hereby covenant with the said party of the second part that said trustee or its successor or successors in the trust hereby created that it will not in any manner set up or seek to take the benefit or advantage of any such valuation stay appraisement redemption or extension laws.

Ninth. And it is further covenanted and agreed that at any sale of the aforesaid property railroad appurtenances and franchises or either or any part thereof whether made by virtue of any power herein granted or by judicial authority the trustee if requested so to do in writing by the holders of a majority in interest of all the bonds hereby secured and then outstanding or if to his satisfaction indemnified may bid for and purchase the same for and on behalf of all the holders of the bonds secured and then outstanding on the proportion of the respective interests of such bondholders at a reasonable price if by a portion thereof be sold at a price not exceeding the total amount of such bonds outstanding with interest accrued thereon and the expenses of such sale in case of a sale of the mortgaged premises or any part thereof in the course of judicial proceedings as hereinbefore provided the purchaser or purchasers at such sale in making payment of the purchase money and
201 making settlement thereof after making a cash payment sufficient to cover the costs and expenses of the sale and all other charges which must be provided for in actual cash shall have the right to deliver and pay to the trustee and turn in and use towards the payment of the purchase money any of the bonds or matured coupons held by him or them to or toward

the payment of which the net proceeds of such sale shall be legally applicable, the amount of such bonds or coupons so to be paid in to be determined and fixed by the trustee and at a sum which shall upon a proper distribution and accounting for such proceeds be at least equal to the share or proportion payable out of such proceeds to such purchaser or purchasers as the holder or holders of such bonds or coupons and in the event of a purchase of the whole property as aforesaid, by said trustee the right and title thereto shall vest in said trustee in trust for the purchasers and each holder of bonds and coupons shall have an interest in the property so purchased on the proportion that his bonds and coupons bear to the entire issue of bonds, and coupons outstanding and the trustee shall take such lawful measures as may be deemed necessary to organize a new company for the benefit of those for whom the purchase was made and the trustee so purchasing shall make such conveyance or conveyances of the premises so purchased to such new corporation as may be deemed necessary.

Tenth. A majority in interest of the holders of all the bonds secured hereby then outstanding shall have the right and power by an instrument in writing under their hands to instruct and to require the trustee herein to exercise any option or privilege hereby conferred upon him in respect to entering into or upon said mortgaged premises or foreclosing the same or selling the same or in respect to any other act to be done by the said trustee hereunder or to waive the right to do so, and also the right and power to reverse or annul the exercise of any such option or privilege which shall have been made by said trustee in the premises and the said trustee shall act accordingly.

Eleventh. The party of the first part shall hereafter keep at its office or agency appropriate books for the registry and transfer of the bonds secured and to be secured hereby in accordance with the terms of said bonds and any and every holder of bonds secured hereby shall be entitled to have his name and address and the number and denomination of the said bonds held by him entered therein upon presenting at the said office a written statement of the said particulars signed by himself and if required duly verifying his title to said bonds by the production thereof or upon written order duly verified of the person last registered as holder the trustee shall have free access at all reasonable hours and times to such books and shall from time to time on request in writing be furnished with a copy thereof.

Twelfth. In case of any foreclosure sale under the provisions hereof the purchaser shall be entitled to turn towards the payment of such purchase money any of the bonds and

matured coupons secured hereby, counting the same at the sum payable out of the net proceeds of such sale thereon after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale and if such share of net proceeds shall be less then the amount then due upon such bonds and coupons to make such settlement by receipting the amount to be credited thereupon.

Thirteenth. The word "trustee" as used in this instrument shall be construed to mean the trustee for the time being whether original substituted or new and such trustee shall be vested with all the estate powers rights authority and privileges hereby granted to and conferred on said party of the second part no trustee herein shall be in any manner responsible for any act default or misconduct of any co-trustee or of any agent appointed to do any of the matters or things
202 herein provided for and it is hereby further covenanted and agreed and this trust is accepted upon the express condition that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering said party of the first part to retain or be in possession of the railroad buildings terminal facilities equipments estates and premises hereby mortgaged or agreed or intended so to be or any part thereof and to use and enjoy the same nor shall the trustee be or become responsible or liable for any destruction deterioration, determination loss injury or damage which may be done or occur to the railroad buildings terminal facilities equipment, estates and premises hereby mortgaged or agreed or intended so to be either by said party of the first part or their agents or servants or by any other persons whosoever, nor shall the trustee be in any way responsible to see to the application by the party of the first part of the proceeds of the bonds hereby secured nor for the consequences of any breach on the part of the party of the first part of any of the covenants herein contained nor of any act of the party of the first part their agents or servants nor shall the trustee be held liable for any act or fault or misconduct of any agent or persons employed by it unless chargeable culpable negligence in the selection or in the continuance of their employment nor shall the trustee be answerable except for its own willful default or misconduct or gross-misconduct. The party of the second part shall not be under any obligation to take any action towards the execution of this trust which in its opinion will be likely to involve it in a personal expense or liability unless one or more of said bondholders shall as often as required by said trustee give it a reasonable indemnity against the same anything herein to the contrary notwithstanding.

The trustee herein may resign and discharge itself of the trusts hereby created by notice in writing to the party of the

first part to be given at least three months before such resignation shall take effect or such shorter time as the party of the first part shall accept as adequate and whenever a vacancy shall occur in the office of trustee hereunder by resignation or otherwise said Board of Directors of the party of the first part or its successors or assigns shall have the right to fill such vacancy by appointment which shall be attested by certificate in writing of the president and secretary of the party of the first part under its corporate seal duly acknowledged and shall be filed in the office of the clerk of the District Court of Woodbury County Iowa, notice of such appointment shall be given by publication in at least one newspaper published in the City of Sioux City at least once a week for three months immediately thereafter and the successor appointed as aforesaid shall continue to be the trustee hereunder until the holders of three-fourths in value of the bonds hereby secured then outstanding shall by instrument or concurrent instruments in writing executed under their hands and seals or the hands of their attorneys in fact duly authorized for that purpose and filed in the office of the clerk of the district court of Woodbury County Iowa, appoint a trustee hereunder in which case upon such filing of such instrument or instruments the trustee thereby appointed shall without any further act deed or conveyance become the trustee hereunder and if the said board of directors shall for thirty days neglect or refuse to fill any such vacancy the same may forthwith be filled by the holders of a majority in interest of the bonds hereby secured then outstanding by filing as aforesaid the instrument or instruments of appointment herein before specified an appointment made in the manner hereinbefore prescribed by or in behalf of the holders of a majority in interest of the bonds hereby secured then outstanding shall
203 supersede any appointment to fill a vacancy theretofore made in any manner whatsoever and any trustee appointed to fill any vacancy or to succeed any trustee hereunder shall be vested with and entitled to all the rights title interest and estate powers duties and trusts herein conveyed and contained as if originally named in this mortgage upon the resignation or removal of any trustee all his powers and authority shall cease but said trustee shall on demand execute a deed or deeds of conveyance to vest in the trustee appointed in his place and upon the trustee hereon expressed all the property rights privileges and franchises which may be held upon the said trusts.

Fourteenth. If the party of the first part its successors or assigns shall and do well and truly pay or cause to be paid unto the person or persons bodies politic or corporate who shall become holders of the bonds intended to be secured hereby be

several and respected sums expressed therein on the day and time hereinbefore mentioned for the payment thereof together with the lawful interest of the same according to the provisions of the said recited obligations or bonds or in accordance with the provisions hereof and shall well and truly keep and perform all the stipulations covenants agreements and things herein required to be kept and performed by the party of the first part according to the true intent and meaning of these presents without any fault or further delay then and from thenceforth as well this present indenture and the estate and property hereby granted and conveyed or hereby intended so to be as the said recited obligations shall become void and of no effect anything hereinbefore contained to the contrary notwithstanding and satisfaction shall be forthwith entered by the trustee upon the record of this indenture of mortgage otherwise the same shall be and remain in full force and virtue.

Fifteenth. The said party of the first part shall and does hereby covenant and agree to and with the said trustee that it will upon reasonable request make, do, execute and deliver any further act, deeds, conveyances and assurances which may be necessary or proper for the better assuring unto the said trustee the premises property railroad appurtenances, rights, privileges franchises hereby mortgaged or intended so to be or for carrying out the purposes and objects of this instrument.

In witness whereof, the said party of the first part has caused this instrument to be executed by its president with its corporate seal attached and attested by the signature of its secretary and the said party of the second part in evidence of its [exceptance] of the trust hereby created has caused these presents to be signed by its President and its corporate seal attached by its secretary to be hereunto affixed this — day ——— A. D. one thousand eight hundred and ——.

.....

By ....., President.

[Seal]

Attest ....., Secretary.

.....

By ....., President.

[Seal] Attest ....., Secretary.

Sealed and delivered in presence of

.....

.....

204 State of Iowa,
Woodbury County—ss.

Be it remembered that on this first day of January 1890 came before me....., a Notary Public in and for Woodbury County State of Iowa personally appeared A. S. Garretson President of the Sioux City Terminal Railroad and Warehouse Company, and D. E. Paullin, the secretary of said Company to me personally known to be such president and secretary and to be the identical persons who signed and executed the foregoing instrument and indenture of trust deed for and on behalf of the Sioux City Terminal Railroad and Warehouse Company and each acknowledged the said instrument to be the voluntary act and deed of the said Sioux City Terminal Railroad and Warehouse Company grantor therein named by them as its president and secretary thereunto duly authorized voluntarily done and executed.

Witness my hand and notarial seal at my office in Sioux City Iowa in said County the day and year first above mentioned.

.....

Notary Public in and for Woodbury County, Iowa.

State of Pennsylvania,
County of Philadelphia—ss.

Be it remembered that on this .... day of January A. D. 1890, before me ..... a Notary Public duly commissioned in and for said County came ..... President of the Trust Company of North America of Philadelphia, Pennsylvania and ..... Secretary of said Company to me personally known to be the president and secretary of said Company and to be the identical persons who signed and executed the within indenture of trust deed as the President and Secretary of said Trust Company of North America, by them as its President and Secretary thereunto duly authorized and that the same was executed by them as such President and secretary for the purposes and by the authority therein set forth.

Witness my hand and notarial seal, this the day and year aforesaid.

.....

Notary Public in and for the County of Philadelphia and State of Pennsylvania.

A. S. GARRETSON, President.

Attest, D. E. PAULLIN, Secretary.

Annual Meeting of the Stockholders.

The stockholders of this company met on the first Monday in January 1890 at the office of the company in Sioux City Iowa,

and organized by electing A. S. Garretson President and D. E. Paullin Secretary of the stockholders meeting and after organization on motion the annual stockholders meeting was adjourned until 11 o'clock A. M. on the twenty-second day of February 1890.

Adjourned. (Signed) ....., President.
(Signed) ....., Secretary.

205 Adjourned Stockholders Meeting.

On the twenty-second day of February 1890 at eleven o'clock A. M. on said day the time to which the annual meeting of the stockholders of this company was adjourned the stockholders met and by unanimous vote of the stock the following resolution was adopted:

Whereas, it is now apparent that the property the stockholders requested the directors of this company to purchase by a resolution adopted on the fourteenth day of December 1889, it is not sufficient to meet the wants and requirements of this company and the sum of one million dollars authorized by said resolutions to be expended in the purchase of property is not sufficient to pay therefor and for the additional property required by the company therefore be it,

Resolved, that the Board of Directors of this Company be requested to purchase and secure for this company lots one (1) two (2) three (3) four (4) five (5) and six (6) in block thirty-one (31) in Central Sioux City, and lot three (3) in block thirty-seven (37) and lots seven (7) eight (8) and nine (9) in block thirty-eight (38) Sioux City East Addition upon the best terms of payment and upon motion the election of the Directors of this company was continued until the 7th day of April 1890 in order that the new stock subscribed for by the Sioux City and Northern Railroad Company may participate in the election of Directors; on motion this meeting of the stockholders was adjourned until the 7th day of April 1890 at ten o'clock A. M. of said day.

A. S. GARRETSON, President.

D. E. PAULLIN, Secretary.

Board Meeting.

At a meeting of the Board of Directors of this company held on the twenty-second day of February 1890 at which all the directors were present the following resolution was adopted by the unanimous vote of the directors:

Whereas the property purchased for this company under the resolution of the Board passed on the 14th day of December 1889, is insufficient for the wants and uses of the company and

the amount authorized to be paid for said property is not sufficient to pay for the same and the additional property needed and

Whereas the stockholders of this Company by resolution this day adopted have requested the Board of Directors for this company the property described in said resolution therefore be it

Resolved: That the President and secretary of this Board are authorized and requested to purchase for this company lots one (1) two (2) three (3) four (4) five (5) and six (6) in block thirty-one (31) in Central Sioux City and lot three (3) in block twenty-seven (27) and lots seven (7) eight (8) and nine (9) in block twenty-eight (28) Sioux City East Addition upon the best terms of payment and the treasurer is authorized to pay for the same out of the fund of this company; on motion it was ordered that the recitals embraced in the resolution of this Board adopted on the 14th day of December 1889 be amended by inserting among the other recitals in said resolution the statement in reference to the ordinance of the City of Sioux City passed on the twenty-sixth day of December 1889, and approved by the Mayor on the 27th day of December 1889 empowering the Sioux City and Northern Railroad Company to assign transfer and sell and convey unto the Sioux City Terminal Railroad and Warehouse Company all the franchises privileges and grants acquired by the Sioux City and Northern Railroad Company under the ordinances of May 29, 1889 and December 5th 1889, mentioned in said resolution. The treasurer of this Company re-
206 ported to the Board of Directors that the Sioux City and Northern Railroad Company has subscribed for eight hundred thousand dollars of the capital stock of this company authorized issued by this board in addition to the two hundred thousand dollars ($200,000.) first subscribed; the record of the proceedings of the Board of Directors held on the 16th and 18th days of September 1889 and the 13th and 14th day of December 1889, were read and approved thereupon the Board adjourned.

A. S. GARRETSON, President.

Attest D. E. PAULLIN, Secretary.

Sioux City Iowa, April 7, 1890.

Pursuant to adjournment the stockholders met at the office of the President on the 7th day of April 1890 at 10 o'clock A. M. On motion of stockholder T. P. Gere, duly seconded and carried the meeting adjourned for the election of directors until June 30, 1890 at 2 P. M.

A. S. GARRETSON, President.

D. T. HEDGES, Secretary Pro tem.

Sioux City Iowa, June 28, 1890.

On the 30th day of June 1890, the adjourned meeting of the stockholders was held at the office of the President at 2 P. M. in Sioux City, Iowa.

President A. S. Garretson in the chair, on Motion D. T. Hedges was elected Secretary of the Meeting; On motion the meeting proceeded to vote for the directors for the ensuing year. T. P. Gere was appointed teller and inspector of election; after a ballot was had the teller and inspector reported that all the votes cast at said election for directors was for the following named persons: A. S. Garretson, D. T. Hedges, and T. P. Gere; and that they each received the vote of the following shareholders casting the following vote:

A. S. Garretson, ...One share.
T. P. Gere, ...One share.
D. T. Hedges, ...One share.
James E. Booge, ...Two share.
John Hornick, ...Two share.
Ed. Haakinson, ...Two share.
The Sioux City & N. R. R. Co. .....9990 shares.

And the same being all the vote cast at said election, said A. S. Garretson, D. T. Hedges and T. P. Gere were declared duly elected as directors until their successors are elected.

On motion the meeting adjourned.

A. S. GARRETSON, President.
D. T. HEDGES, Secretary.

Sioux City Iowa, June 28, 1890.

The directors of this company met at the office of the President on the 30th day of June 1890 at 2:30 P. M. for the purpose of electing officers and transacting such other business that might come before the meeting; Present A. S. Garretson T. P. Gere and D. T. Hedges. On motion the Board proceeded to the election of officers President A. S. Garretson called to the chair and D. T. Hedges elected Secretary of the meeting. The Board thereupon proceeded to said election and the following result:

A. S. Garretson, President and Treasurer.
T. P. Gere, Vice President.
207 D. T. Hedges, Secretary.

And said persons were declared elected directors until their successors are elected. The following resolution was presented for consideration, and a motion made that it be adopted:

Resolved: That the Trust Company of North America, Philadelphia, Trustee under the mortgage made by this Company

dated January 1, 1890, be authorized and they are instructed to deliver the 1250 bonds of the denomination of $1000 each, secured by said mortgage, to the order of A. S. Garretson Esq., which resolution being duly seconded was adopted by the vote of all the directors. On motion duly seconded and carried A. S. Garretson Esq. was authorized to sell and dispose of the bonds of this Company on such terms as he may deem best.

A. S. GARRETSON, President.

D. T. HEDGES, Secretary.

Pages 80 to 110 of Terminal Record.

Sioux City, Iowa, Dec. 16-93.

At a meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Co., held at the office of the Credits Commutation Co., in Sioux City, Iowa, December 16th 1893, at 3:45 o'clock P. M., the following Directors were present, to wit:

E. H. Hubbard (representing D. T. Hedges) Ed. Haakinson; John Hornick; A. S. Garretson and T. P. Gere, A. S. Garretson in the chair, the following proceedings were had, to wit:

E. H. Hubbard, acting for D. T. Hedges, tendered Mr. Hedges' resignation as Director of the Board, same was seconded by Ed. Haakinson, and thereupon duly accepted. Upon motion D. L. Plumer was nominated and elected in his place.

Ed. Haakinson offered his resignation, which was seconded by John Hornick and duly accepted; John Ellis was elected to fill the vacancy; A. S. Garretson offered his resignation, same being seconded by D. L. Plumer, was duly accepted, and T. A. Stoddart was elected in his place.

John Hornick tendered his resignation as Director on the Board which was accepted and Wm. Reynolds was elected in his place.

T. P. Gere offered his resignation on the Board which was accepted and E. O. Macfarlane was elected in his place.

The newly elected Board of the Sioux City Terminal R. R. and Warehouse Company met at the office of the Credits Commutation Co., Sioux City December 16th 1893, the following Directors being present, to wit:

D. L. Plumer, T. A. Stoddart, Col. Jno. Ellis, E. O. Macfarlane and Wm Reynolds, Col. John Ellis in the chair, and Wm. Reynolds elected Secretary of the meeting; the following proceedings were had to wit:

On motion it was voted to proceed to the election of officers thereupon T. A. Stoddart was nominated for the office of Secretary and Treasurer, and receiving the unanimous vote therefor, was declared duly elected.

On motion D. L. Plumer was nominated for President, and upon receiving the unanimous vote therefor was duly declared elected President of the Company. Upon motion Col. Jno. Ellis was nominated for the office of Vice-President and upon receiving the unanimous vote therefor was duly elected Vice President of the Company.

208 No other business appearing, on motion the Board adjourned until Tuesday December 19th, 1893, at the office of the Credits Commutation Co., in Sioux City.

T. A. STODDART, Secretary.

Proceedings of a meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Company.

At a meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Co., held at the office of the Union Loan and Trust Co., of Sioux City Iowa, Tuesday December 19th, 1893 the following Directors were present:

D. L. Plumer, T. A. Stoddart Wm. Reynolds, John Ellis and E. O. Macfarlane. There being no business the meeting adjourned until Wednesday December 20th, at 4 P. M.

T. A. STODDART, Secretary.

At an adjourned meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Co., held at the office of the Union Loan and Trust Co., in Sioux City Iowa, Wednesday December 20th, 1893, at 4 P. M. the following directors were present: Wm. Reynolds, E. O. Macfarlane, Col. Jno. Ellis and T. A. Stoddart. There being no business on motion the Board adjourned to meet Thursday December 21st, at 10 o'clock A. M.

T. A. STODDART, Secretary.

At an adjourned meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Co., held at the office of the Union Loan and Trust Co., on Thursday December 21st, 1893, the following Directors were present, who constitute the full Board: D. L. Plumer, T. A. Stoddart, Wm. Reynolds, John Ellis, E. O. Macfarlane; the following proceedings were had.

President D. L. Plumer took the chair, and thereupon Director E. O. Macfarlane tendered his resignation; the same was duly accepted and upon motion Wm. Faxon Jr. was unanimously elected to fill the vacancy; there being no further busi-

ness, on motion the Board adjourned until 9 o'clock A. M. December 22nd.

T. A. STODDART, Secretary.

At an adjourned meeting of the Board of Directors of the Sioux City Terminal R. R. and Warehouse Co., duly held at the office of the Credits Commutation Co., in Sioux City, Iowa, on this 23rd day of December A. D. 1893, at which were present the following Directors to wit: D. L. Plumer, T. A. Stoddart, Wm. Reynolds, John Ellis, and Wm. Faxon, Jr., the following proceedings were had:

President D. L. Plumer took the chair and thereupon Director Wm. Reynolds offered the following resolution and moved its adoption; the same was duly seconded by John Ellis, to wit:

Whereas, on the 14th day of December A. D. 1889, this company made and entered into a certain lease to and with the Sioux City & Northern Railway Company under and by virtue of the terms of which lease all of the property, and all rights, privileges, and franchises, and rights of way of every kind and nature whatsoever, held by this company, were leased unto the said Sioux City and Northern Railroad Co. for the term and period of 100 years at an annual rental of $90,000 per year, payable quarterly, and

Whereas, the said Sioux City and Northern Railroad
209 Co. has failed, neglected and refused to pay the rental accrued under and by virtue of the terms of said lease, and in accordance therewith and

Whereas, In a suit now pending in the Circuit Court of the United States in and for the Northern District of Iowa, wherein the Manhattan Trust Co. is plaintiff and the said Sioux City and Northern Railroad Co. is defendant, Hon. Warwick Hough and Sam'l J. Beals have been appointed Receivers of the property of the said Sioux City and Northern Railroad Co., and as such Receivers are in possession of a portion of the property leased as aforesaid;

Now therefore, Be it resolved, that the president of this Company be instructed to forthwith make demand both orally and in writing upon the said Sioux City and Northern Railroad Co., and also upon the said Receivers for the payment of said rental, and immediately thereafter make report of the result of said demand.

And thereupon, said resolution being put to vote, was declared duly adopted, and thereupon on motion of Director T. A.

Stoddart, John Ellis duly seconding, said Board adjourned to meet at 3 o'clock on this same day.

T. A. STODDART, Secretary.

The Board of Directors of the Sioux City Terminal R. R. and Warehouse Co. met at the office of the Credits Commutation Co., in Sioux City, Iowa, on the 23rd day of December A. D. 1893, at 3 o'clock P. M., pursuant to adjournment the following Directors being present to wit: D. L. Plumer, John Ellis, Wm. Reynolds, T. A. Stoddart, and Wm. Faxon Jr. President D. L. Plumer in the chair. And thereupon the following proceedings were had:

President D. L. Plumer reported that he had made demand as instructed by the Board upon the Sioux City and Northern Railroad Co., for the payment of the rentals reserved and provided for in the certain lease made on the 14th day of December A. D. 1889, by and between this company and the said Sioux City and Northern Railroad Co., and in accordance with the terms of said lease, and that payment thereof was refused on the part of said company, and that said Receivers also refused payment thereof, and declared their inability to pay said rental, out of the revenue of the property in their hands, and announced their intention to continue to refuse to pay said rentals.

The said President also reported that the said Sioux City and Northern Railroad Co. was insolvent and was wholly unable and would continue to be wholly unable to meet said rentals.

And after receiving said report upon motion of Directors Wm. Reynolds seconded by Director T. A. Stoddart, the following resolution was duly adopted:

Whereas, On the 14th day of December A. D. 1889, this company made and entered into a lease with the Sioux City and Northern Railroad Co., whereby it leased to the said Sioux City and Northern Railroad Co. for a period of 100 years all of its property rights privileges franchises of every kind and nature, at an annual rental of $90,000 per year, payable quarterly, and

Whereas, said Sioux City and Northern Railroad Co. has refused and now refuses to pay the sum of $22,500 rental for the quarter ending September 14th, 1893, and said default has now continued for a period of more than 30 days, and

Whereas, Demand has been made upon said Sioux City and Northern Railroad Co., and upon the Hon. Warwick Hough and S. J. Beals, Receivers thereof, for the payment of said rental and the payment thereof has been refused, and

Whereas, It also appears that the said Sioux City and Northern Railroad Co. is wholly insolvent and will be unable to pay the said rental, and

Whereas, further the Trust Company of North America claims the quarterly rental falling due September 14th, 1893, under and by virtue of a certain alleged mortgage or trust deed, under and by virtue of which they claim certain rights in and to the said leasehold interest;

Now, therefore, be it resolved that the said Sioux City Terminal R. R. and Warehouse Co., under and by virtue of the powers to it reserved in said lease, and so far as it may lawfully do so under the terms and conditions thereof, but not assuming any authority which it may not lawfully exercise, notwithstanding any rights or interests of said Trust Co. of North America, does hereby elect to declare the said lease and all rights thereunder of the said Sioux City and Northern Railroad Co. forfeited and does instruct its President to enter in and upon said premises and to make immediate demand for the possession thereof, upon said Sioux City and Northern Railroad Co., and upon said Warwick Hough and Samuel J. Beals, Receivers of said Company, so far as such demand may be lawfully made upon them and also serve notice upon the said Sioux City and Northern Railroad Co. and upon said Receivers of said forfeiture and take such other and further steps as may be necessary to obtain the possession of said property, and to render the forfeiture of said lease of full force and effect and thereupon on motion said President was instructed to report two actions in giving notice of said forfeiture and demanding possession and said meeting adjourned until 3:10 of this same day.

T. A. STODDART, Secretary.

At an adjourned meeting of the Directors of the Sioux City Terminal R. R. & Warehouse Co., duly held at the office of the Credits Commutation Co., in Sioux City Iowa, on this 23rd day of December A. D. 1893, at 3:10 o'clock P. M. pursuant to adjournment, the following Directors were present, to wit: D. L. Plumer, T. A. Stoddart, Wm. Reynolds, John Ellis, and Wm. Faxon Jr. President D. L. Plumer in the chair, and

Thereupon he reported that he had served notice of said forfeiture and demand for possession upon Ed. Haakinson, Vice President of the said Sioux City & Northern Railroad Co., the President of said Company being absent and also had served the same upon the said Warwick Hough and Samuel J. Beals, Receivers of the said Sioux City & Northern Railroad Co., a

copy of which said notice and demand he presented with said report which said notice and demand is as follows, to wit:

Sioux City Iowa, Dec. 23rd, '93.

To the Sioux City and Northern Railroad Co., and to Warwick Hough and Samuel J. Beals, Receivers of the Sioux City & Northern Railroad Co.

You will please take notice that,

Whereas, the rental reserved under and by virtue of a certain lease made and executed on the 14th day of December A. D. 1889 by and between the Sioux City and Northern Railroad Co. and the Sioux City Terminal R. R. and Warehouse Co., is in default and has remained in default for a period of more than 30 days, and

Whereas, demand has been expressly made for the payment of said rental and the same has been by you refused;

Now, therefore, the Sioux City Terminal R. R. and Warehouse Co., the lessor named in said lease, under and by virtue of the terms of said lease, and so far as it may lawfully do so, has elected and does hereby elect to declare said lease forfeited, and does hereby notify you that said lease, from and after this date, is and shall be forfeited, so far as such forfeiture may be lawfully declared by the said Sioux City Terminal R. R. and Warehouse Co., and you are further notified that the said Sioux City Terminal R. R. and Warehouse Co. does hereby elect
211 under and in accordance with the terms and conditions of said lease, to enter in and upon the premises and property covered by the said lease, and does hereby so far as it may lawfully do so elect to repossess itself thereof and does demand of you the possession of all and singular of all the property, rights, privileges and franchises covered by the said lease, and the possession of which is now held by the said Sioux City and Northern Railroad Co., and by the said receivers, such entry, however, being made, so far as said Receivers are concerned subject at all times to any proper orders, judgments or decrees which the court appointing said receivers may have made or may hereafter make in the premises; said demand and entry being only made, so far as the said Sioux City Terminal R. R. and Warehouse Co. may rightfully and lawfully make the same, under and by virtue of the express terms and conditions of the said lease.

THE SIOUX CITY TERMINAL R. R. & WAREHOUSE CO.
By D. L. PLUMER, President.
T. A. STODDART, Secretary.

(The above is exhibit "7" in evidence of D. L. Plumer.)

Sioux City, Iowa, December 23, '93.

To the Sioux City and Northern Railroad and to Warwick Hough and Samuel J. Beals Receivers thereof:

The Sioux City Terminal R. R. and Warehouse Co. does hereby demand of the Sioux City and Northern Railroad Co., under and by virtue of the terms of the certain lease made and executed by and between the said Sioux City and Northern Railroad Co. and the said Sioux City Terminal R. R. and Warehouse Co., on the 14th day of December A. D. 1889, the payment under and in accordance with the terms of the said lease of the sum of $22,500 being the quarterly rental falling due under the said lease on the 14th day of September A. D. 1893, and further the said Sioux City Terminal R. R. and Warehouse Co. does hereby demand of the said Warwick Hough and Samuel J. Beals, so far as the said demand may lawfully be made of them and subject at all times to such orders as may rightfully be made by the Court appointing them, payment of the said rentals as hereinbefore demanded of the said Sioux City and Northern Railroad Co., and especially and separately is the demand of the said quarterly rental falling due on the 14th day of September 1890 made of them, under the reservations hereinbefore stated. Nothing herein contained however shall be construed as a waiving of the right to demand and collect any other or further sums which may be due for said rentals under said lease to this date for which continuing demand is at all times made.

THE SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO.

By D. L. PLUMER, President.

T. A. STODDART, Secretary.

(The above is exhibit "6" in evidence of D. L. Plumer.)

And thereupon Director Jno. Ellis offered the following resolution, to wit:

Whereas, on the 24th day of April A. D. 1893, the said Sioux City Terminal R. R. and Warehouse Co. was indebted to divers persons upon notes made by it to the Union Loan & Trust Co., of Sioux City Iowa, and by said Union Loan and Trust Co. sold over its endorsement to said persons to an aggregate amount of $718,000 and was also indebted to said Union Loan and Trust Co. upon an over draft in the further sum of $10,000 which amounts are still unpaid, and are outstanding and subsisting liabilities of said Sioux City Terminal R. R. and Warehouse Co., and

Whereas, said Sioux City Terminal R. R. and Ware-
212 house Co. did on the 24th day of April A. D. 1893, make and execute to said Union Loan & Trust Co. its certain notes in the sum of $750,000 and did secure the same by a mortgage to the said Union Loan & Trust Co. of all its property, rights, and franchises, the same to be held and used as security for indebtedness hereinbefore mentioned which said mortgage was duly recorded in the office of the recorder of Woodbury County Iowa on the 25th day of April A. D. 1893, at 11:30 o'clock A. M., and

Whereas, thereafter to wit on the 25th day of April A. D. 1893, said Union Loan & Trust Co. made an assignment for the benefit of its creditors to said E. H. Hubbard, and thereafter to wit on or about the 26th day of April A. D. 1893, said seven hundred and fifty thousand (750,000) dollars of notes were delivered to said Assignee and by him received and held as and for security as aforesaid and as trustee for said noteholders, and to secure said indebtedness to said Union Loan & Trust Co., and

Whereas, in the certain suit now pending in the Circuit Court of the United States in and for the Northern District of Iowa, wherein the First National Bank of Montpelier et al are plaintiffs and the said Sioux City Terminal R. R. and Warehouse Co. are defendants wherein said plaintiffs ask the foreclosure of said mortgage, question has been made as to the validity of said mortgage, and

Whereas, It was the purpose and intent of the said Sioux City Terminal R. R. and Warehouse Co., in executing said mortgage and the notes secured thereby to fully secure the indebtedness aforesaid upon all the rights, franchises and property of the said Sioux City Terminal R. R. and Warehouse Co., and

Whereas, further, since the execution of said mortgage and notes it has become manifest that the said Sioux City Terminal R. R. and Warehouse Co. is wholly insolvent and that all its resources of every kind and character are insufficient to pay the charges and debts of the said Sioux City Terminal R. R. & Warehouse Co., and default is now impending upon its alleged first mortgage to the Trust Company of North America, by reason of the interest in the sum of thirty-seven thousand five hundred (37500) dollars, falling due on the first day of Jan. A. D. 1894, and said Sioux City Terminal R. R. and Warehouse Co. is wholly without means with which to meet said interest and prevent said default, and

Whereas, the Sioux City and Northern Railroad Co., lessee of the property of the said Sioux City Terminal R. R. and Ware-

house Co., has also made default in the payment of its rentals due to the said Terminal Co., and is also wholly insolvent and is unable and refuses to pay said rental which is the sole resource from which the said Sioux City Terminal R. R. and Warehouse Co. could meet said interest and prevent said default, and

Whereas, the validity of the said first mortgage to the said Union Loan and Trust Co. in dispute the beneficiaries thereof cannot satisfy and reasonably provide for the protection of their interests by preventing said default, and

Whereas, for their better security in that behalf said Sioux City Terminal R. R. and Warehouse Co. has entered upon the possession of said property and declared forfeiture of said lease to said Sioux City and Northern Railroad Co., after demand for said rental and refusal as hereinafter set forth, and

Whereas, it appears expedient and for the best interests of said company, and a measure demanded by justice to said creditors in the due protection of their rights and interests, that said property included in said mortgage to the Union Loan and Trust Co. should be conveyed absolutely to a Trustee for their benefit and said E. H. Hubbard appears a fit and suitable person therefor;

Now, therefore, be it resolved, that the President and
213 Secretary of this company be authorized and directed to execute and deliver to said E. H. Hubbard Trustee, a deed in the following form to wit:

Know all men by these presents, that this indenture, made and executed by and between the Sioux City Terminal R. R. and Warehouse Co., of Sioux City, Woodbury County, Iowa, a corporation hereinafter designated the party of the first part, and E. H. Hubbard, trustee of Sioux City, Woodbury County, Iowa, hereinafter designated the party of the second part, witnesseth:

Whereas, on the 24th day of April A. D. 1893, the said party of the first part, was indebted to divers persons upon notes made by it to the Union Loan and Trust Co., of Sioux City, Iowa, by said Union Loan and Trust Co., sold over its indorsement to said persons to an aggregate amount of $718,000, and was also indebted to said Union Loan and Trust Co. upon an overdraft in the further sum of $10,000 which amounts are still unpaid and are outstanding and subsisting, liabilities of said first party, and

Whereas, said first party did on the 24" day of April A. D. 1893, make and execute to said Union Loan and Trust Co. its certain notes in the sum of seven hundred and fifty thousand

(750,000) dollars, and did secure the same by a mortgage to the said Union Loan and Trust Co. of all its property, rights and franchises, the same to be held and used as security for the indebtedness hereinbefore mentioned, which said mortgage was duly recorded in the office of the Recorder of Woodbury County, Iowa, on the 25th day of April A. D. 1893, at 11:30 o'clock a. m., and

Whereas, thereafter to wit on the 25th day of April A. D. 1893, said Union Loan and Trust Co. made an assignment for the benefit of its creditors to said E. H. Hubbard, party of the second part, and thereafter, to wit on or about April 26, A. D. 1893, said seven hundred and fifty thousand (750,000) dollars of notes were delivered to said assignee, and by him received and held as and for security as aforesaid, and as trustee for said noteholders, and to secure said indebtedness to said Union Loan & Trust Co., and

Whereas, in the certain suit now pending in the Circuit Court of the United States in and for the Northern District of Iowa, wherein the First National Bank of Montpelier et al are plaintiffs and said Sioux City Terminal R. R. and Warehouse Co. et al are defendants, wherein said plaintiffs ask the foreclosure of said mortgage, question has been made as to the validity of said mortgage, and

Whereas, it was the purpose and intent of said first party in executing said mortgage and the notes secured thereby to fully secure the indebtedness aforesaid, upon all the property rights, equities and franchises of said first party, and

Whereas, further since the execution of said mortgage and notes it has become manifest that said party of the first part is wholly insolvent, and that all its resources of every kind and character are insufficient to pay the charges and debts of said first party, and default is now impending, upon its certain alleged first mortgage to the Trust Co. of North America by reason of the interest in the sum of thirty-seven thousand five hundred (37,500) dollars, falling due thereon the first day of January A. D. 1894, and said first party is wholly without means with which to meet said interest and prevent said default, and

Whereas, the said Sioux City and Northern Railroad Co., lessee of the property of the said first party has also made default in the payment of its rentals due to said first party, and is also wholly insolvent and is unable and refuses to pay the said rental which is the sole resource from which the said first party could meet said interest and prevent said default, and

Whereas, with the validity of the said mortgage to the
214 said Union Loan and Trust Co., in dispute the beneficiaries thereof cannot satisfy and reasonably provide for the protection of their interests by preventing said default, and

Whereas, for their better security in that behalf said first party has entered upon the possession of said property and declared forfeiture of said lease to said Sioux City and Northern Railroad Co., after demand for said rental and refusal as hereinafter more fully set forth.

Now therefore, to the end that the purpose and interest of said first party in the execution of said mortgage and notes may be fully carried out and to the further end that absolute title in and to all and singular the property rights, equities and franchises of said first party may be vested in said second party, for the benefit of the creditors hereinafter named and in accordance with the resolution of the board of directors of the said first party, this day duly passed, the said Sioux City Terminal R. R. and Warehouse Co., party of the first part (in consideration of the premises and the sum of one dollar in hand paid) doth by these presents grant, sell and convey unto the said E. H. Hubbard, trustee, party of the second part, all and singular the following described real estate, situated in Woodbury County, Iowa, to wit:

All of block twenty-six (26); all of block twenty-seven (27); all of block twenty-eight (28); all of block twenty-nine (29); all of block thirty (30); all of block forty-four (44), lots seven to sixteen (7 to 16) inclusive in block thirty-one (31); all in Central Sioux City; the east half of block thirteen (E. ½ 13); all of block fifteen (15) lots ten (10), eleven (11) and twelve (12), and the west third (W. ⅓) of lots two (2) and three (3) in block seventeen (17) all in Middle Sioux City.

Lots one (1) and two (2), in block twenty-five (25); all of block twenty-six (26) lots two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12) in block twenty-seven (27); lots one (1), two (2), three (3), four (4), five (5), six (6), eight (8), nine (9), ten (10), eleven (11) and twelve (12) in block twenty-eight (28); lots eight (8) and nine (9) in block twenty-nine (29), all in Sioux City East Addition; together with all the real estate now owned by the said party of the first part and together with all buildings and improvements thereon, or that may hereafter be erected hereon, and all railway lines, side tracks, yards, passenger and freight depots, warehouses, storage houses, elevators, and other terminal facilities now thereon, or that may be hereafter erected thereon; also all rights, privileges, franchises, rights of way of every kind or nature whatsoever, held by this

company, or that may hereafter be acquired by it, including all rights and franchises, acquired by it under and by virtue of any ordinances or contracts held by it, also all rights in and to any lease now held by said company or that may hereafter be acquired, also all properties, rights, hereditaments of every kind and nature whatsoever that may hereafter be acquired by this company within the corporate limits of Sioux City, Iowa; the intention being hereby to grant, convey, bargain and sell unto the party of the second part all real estate and personal property, franchises, rights-of-way, rights, privileges, or leases, buildings, improvements, depots, elevators, warehouses, tracks, and each and every kind of property now owned or hereafter acquired by the said party of the first part.

To have and to hold unto the said E. H. Hubbard, his heirs, administrators and assigns and to his successors in the trust hereinafter set forth, being lawfully thereunto appointed, forever with all the appurtenances thereunto belonging, and said first party does further give and grant unto the said second party full power and authority to hold and exercise all powers, privileges, rights and franchises held, owned or enjoyed by the said first party, together with all leasehold rights, or rights of action of every kind and nature, owned by said first party,
and does hereby give and grant to said second party full
215 power and authority to institute, defend or maintain,
either in his own name or in the name of said first party, all rights of action, whether in law or equity which may be necessary for the proper protection of said property or of the rights, privileges, franchises, herein conveyed, also giving and granting unto the said second party full power and authority to make and execute either in his own name or in the name of said first party all rights of action, whether in law or equity, which may be necessary for the proper protection of said property, or of the rights, privileges and franchises herein conveyed; also giving and granting unto the said second party full power and authority to make and execute either in his own name or in the name of said first party, all such conveyances, receipts or acquittances as may be necessary for the full performance of the trusts hereinafter set forth, this conveyance is made, however, with full notice of the assertion of the following claims against the said property, to wit:

A certain mortgage or trust deed to the Trust Co., of N. A., of Philadelphia, Pennsylvania, as trustee, to secure certain bonds for the sum of one million two hundred and fifty thousand (1,250,000) dollars; and also certain mechanic's liens to the amount of about $55,000. And also certain judgments to the amount of about $20,000. Nor shall said first party be under-

stood to covenant that there are not other claims than those hereinbefore expressly mentioned, none of which however, are to be considered as assumed by said second party, nor by the acceptance of this deed is he in any wise held to admit the validity of said trust deed, liens, judgments or of any claims made or that may arise thereunder, nor shall this deed be held in any manner to operate as a merger of said mortgage to said Union Loan and Trust Co., but said mortgage shall at all times be kept in full force until all persons corporations, entitled and claiming benefits thereunder shall consent to its discharge, or so long as it may be necessary to keep said mortgage in force for the protection of the title herein conveyed, or any interests claimed by virtue hereof, with full notice also of all claims which the Trust Company of North America may of right lawfully have and make under and by virtue of its trust deed in and to a certain lease made and executed by and between said party of the first part and the said Sioux City and Northern Railroad on the 14" day of December A. D. 1889, whereby all of the property hereinbefore conveyed was leased to the said Sioux City and Northern Railroad Co. for the period of 100 years, which said lease the party of the first part has, prior to the execution of these presents, declared forfeited so far as it may rightfully and lawfully so do, under the terms and conditions of said lease and has made re-entry in and upon the premises, properties, rights, equities and franchises so leased to the said Sioux City and Northern Railroad Co., for breach of the terms and conditions of said lease by said lessee in that said lessee has made default in the payment of the rental reserved under and in accordance with the terms of said lease, and said default has continued for a period of more than thirty days, and said lessee has expressly refused to pay such rental after demand therefor has been duly made by said first party, and said first party thereupon elected and does elect to declare the said lease forfeited so far as it may of right lawfully do; the intention being hereby to convey unto the said second party so far as the said first party may rightfully and lawfully execute said conveyance all of the said property, rights, equities and franchises, free and clear of said leasehold, interest with full notice however, of all rights and claims which may lawfully be asserted thereunder by the said Trust Company of North America, and subject also to all such judgments, orders and decrees as may be of right entered in the said action now pending in said Circuit Court of the United States in and for the Northern District of Iowa, wherein
the First National Bank of Montpelier et al are plain-
216 tiffs, and the said Sioux City Terminal R. R. and Warehouse Co. et al are defendants, not meaning or intending however, to in any manner hinder or embarass in behalf of any other party, the rights of said complainants to dismiss said bill

when they shall be at any time advised so to do, nor to interfere with the receiverships therein appointed the complainants the only parties named therein appearing and at whose instances and in the protection of whose rights said receivership was instituted, having expressly consented to said demand, entry and forfeiture as aforesaid, in trust, nevertheless, in and for the uses and trusts, and with the authority and power and upon the conditions hereinafter set forth, to wit:

First. The said property rights, equities and franchises herein conveyed, shall be held by the said second party for the use and benefit of all those persons, firms or corporations, who may hold and own notes of the Sioux City Terminal R. R. and Warehouses Co., sold by and through the said Union Loan and Trust Co., and by it indorsed, and also for the use and benefit of the said E. H. Hubbard as assignee of the said Union Loan and Trust Co., in the amount and sum of ten thousand (10,000) dollars overdraft against said first party.

Second. Said first party may at any time after the lapse of five years from this date at his own discretion and at private or public sale as may by him be deemed best, proceed to sell said property rights, equities and franchises, or may at any time be required to make such sale by the written request of more than one-half of the said creditors in amount; said request to specify the time and place of such sale, and the manner and terms thereof. No sale however, shall be made until notice of the time, place and terms thereof shall be given, by publication for at least two weeks in one newspaper of general circulation published in each of the following cities, to wit: Sioux City, Chicago, New York and Boston.

Third. The net proceeds of said sale after deducting therefrom all expenses of the trust, including a reasonable compensation to the said second party as trustee, shall be divided equally pro rata among the said several creditors in proportion to their several claims as their respective interests shall be made to appear.

Fourth. Said trustee shall also be empowered and required upon the application of the holders of at least two-thirds in amount of said indebtedness of $718,000 made in writing to convey the property, rights, equities and franchises herein conveyed to any corporation that may be designated in said application, and to receive the stock of said corporation to the amount at par value of the notes then outstanding, and shall hold said stock for the benefit of the holders of said indebtedness to be surrendered to said holders upon the surrender and cancellation of the notes or debts by them respectively held;

notice, however, of such application shall be first given as required in the second paragraph hereof.

Fifth. Said second party shall also be authorized and empowered to at once, if he may lawfully do so, enter into and upon the possession of the premises, all and singular and to rent the same or any part thereof, to such persons or corporations, and at such rentals as he may in his discretion deem best. Provided, however, that no lease shall be made by him for a period of more than one year, without first obtaining the assent and approval of a majority of the executive committee of the Credits Commutation Co., of Sioux City, Iowa. The net proceeds derived from said property, and the rentals thereof, after deducting therefrom all such sums as may be necessary for the payment of all expenses of the trust, including a reasonable compensation to said trustee for his services shall be divided equally, pro rata, among said several creditors in proportion to their several claims as their respective interests may be made to appear.

217 Sixth. The said second party as such trustee, shall not be held to assume any personal liability or responsibility by reason of said conveyance to him, nor shall he be in any manner held to the payment of any expense connected with the operation, protection, management or control of said property, nor to the payment of any taxes or improvements thereon, nor shall he be under any obligations to make any conveyance or sale or to pursue any litigation arising out of claims upon said property or out of this conveyance, unless his cestuis que trust, or such of them as may so desire shall have first paid to him or secure to his satisfaction the payment to him of any and all expenses, taxes, insurance, attorneys fees and costs of every kind and nature, including a reasonable compensation for his own services.

And in the event of such advances being made by any of said cestuis que trust, such advances shall constitute a prior claim upon any proceeds derived from said property in the hands of said trustee, and shall be first paid before any distribution shall be made to any creditors not joining in said advances.

And it is further agreed that the said trustee shall not be answerable for the default or misconduct of any agent, employee or attorney by him employed or appointed under or pursuant to these presents, or in the proper carrying out of the trusts herein imposed, if such agent, employee or attorney shall be selected with reasonable care, nor for any error or mistake made by him in good faith, but only for personal misconduct or gross negligence in the execution of said trusts.

Seventh. In case the said second party shall die or become non compos mentis, or for any other reason shall become legally incapable or unfit for the proper performance of the duties and trusts herein imposed upon him, or if he shall resign the trust which he may at any time do, after giving notice of his intention in writing, to all such holders of said indebtedness whose address may be to him known, by mailing notices to them at their last known post office addresses, at least 30 days prior to said resignation, or in case two-thirds in amount of said holders of said indebtedness shall elect to change the said trustee, then and in that case it shall be competent for any number of said creditors holding not less than one-fourth in amount to make application to the District Court of Woodbury County, Iowa on in vacation to any Judge thereof, to appoint a new Trustee, and thereupon, after such notice being given to all parties in interest as said Court or Judge may prescribe, such new Trustee may be appointed by such Court or Judge and the order or decree making such appointment shall stand as a conveyance of all property, rights, equities and franchises herein conveyed to said second party as fully as if said new Trustee had been expressly named as Trustee in this conveyance; and said new Trustee shall succeed to all the rights, powers and privileges and shall have and hold all the rights, titles and interests and be subject to all the duties liabilities limitations and obligations herein granted, conveyed and imposed upon said second party.

Eighth. No purchaser from said trustee and no lessee under him shall be required to see to the application and distribution of the funds, rentals, or purchase money, that may be paid to the said Trustee and his conveyance or acquittance therefor shall be in full satisfaction and discharge of all obligations arising thereunder.

In witness whereof, the said party of the first part has caused its seal to be hereunto affixed and these presents to be signed by its President and Secretary on this 23rd day of December A. D. 1893.

THE SIOUX CITY TERMINAL R. R. & WAREHOUSE CO.
By D. L. PLUMER, President.

Attest T. A. STODDART, Secretary.

(The above is exhibit "S" in evidence of D. L. Plumer.)

218 State of Iowa,
County of Woodbury—ss.

On this 23rd day of December A. D. 1893, before me E. A. Burgess, a Notary Public in and for said County, personally

appeared D. L. Plumer and T. A. Stoddart, both well and personally to me known to be the same persons whose names are subscribed to the foregoing instrument as the President and Secretary respectively of the Sioux City Terminal R. R. and Warehouse Co., the corporation described in and who executed the said instrument as the party of the first part, thereto, and personally to me known to be the President and Secretary of the said corporation, and acknowledged the seal affixed to said instrument to be the corporate seal of said corporation, and that said seal was affixed thereto by the authority of said company and its Board of Directors, and that they respectively subscribed to said instrument as President and Secretary of said company by like authority and the said D. L. Plumer President and the said T. A. Stoddart Secretary acknowledged to me the execution of said instrument as their voluntary act and deed and as the voluntary act and deed of said company by them as such officers thereunto duly authorized and appointed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

.....

Notary Public in and for Woodbury County.

Which form is hereby ratified adopted and approved for the uses and purposes set forth in said deed.

And said resolution being seconded by Director John Ellis was unanimously adopted.

And thereupon on motion said Board adjourned to meet on the 15th day of January A. D. 1894, at the Auditorium Hotel, Chicago.

Stipulation as to indebtedness. Filed May 25, 1895.

In the United States Circuit Court Northern District of Iowa. Western Division.

Trust Company of North America, Plaintiff,

vs.

Sioux City Terminal Railroad & Warehouse Company et als. Defendants.

It is hereby stipulated by and between the parties hereto, that there are outstanding due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company, negotiated through the Union Loan & Trust Company under its indorsement, to the amount of seven hundred eighteen thousand dollars ($718,000) being the notes purporting to be secured by exhibit 8 in evidence purporting to be a deed from the Sioux

City Terminal Railroad & Warehouse Company to E. H. Hubbard, trustee for the benefit and security of said notes.

And it is further admitted that the amount of alleged railroad syndicate indebtedness referred to in the evidence of John Hornick as being between $3,100,000 and $3,200,000 at the time of the failure of the Union Loan & Trust Company
219 is still outstanding and unpaid in the sum of three million one hundred thousand dollars (3,100,000).

TRUST COMPANY OF NORTH AMERICA.
By JOY, CALL & JOY,
Its Attorneys and Solicitors.

E. H. HUBBARD,
Assignee of the Union Loan & Trust Company.

E. H. HUBBARD,
Trustee, Sioux City Terminal Railroad & Warehouse Company, and the other parties answering in connection with these named in their amendment to answer filed herein October 16, 1893, by

SPALDING, TAYLOR & BURGESS,
Its attorneys and solicitors.

Indorsed: 142. Equity. United States Circuit Court Northern District of Iowa, Western Division. Trust Company of North America vs. Sioux City Terminal Railroad & Warehouse Co. et al. Stipulation. Filed May 25, 1895. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

"The Sioux City Terminal Railroad & Warehouse Company Credits Commutation Company, E. H. Hubbard Trustee, and E. H. Hubbard assignee, offer in evidence the lease from the Sioux City Terminal Railroad & Warehouse Company to the Sioux City & Northern Railroad Company, and it is agreed by all the parties hereto, that the copy thereof attached to the deposition of John Cadwalader shall stand in lieu of and with the same force and effect as the original, without being repeated in the evidence."

"The Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard, trustee, and E. H. Hubbard assignee, offer in evidence the petition of intervention of the Trust Company of North America, filed herein December 18, 1893, and by agreement of all parties hereto, the filed copy of said petition of intervention is to stand in lieu of the original thereof, without being repeated in the evidence."

220 And afterwards to wit: Apr. 26", 1896, there was filed in said cause the following paper to wit:

It is agreed by the parties to this suit that Exhibit 6 offered in connection with the evidence of D. L. Plumer is the same in words as the written demand set out in the original records of the Sioux City Terminal Railroad & Warehouse Company, commencing on page 91, under date December 23, 1893, and addressed to the Sioux City & Northern Railroad Company and signed by the Sioux City Terminal R. R. & Warehouse Company, by D. L. Plumer, President; and that Exhibit 7, offered in evidence in connection with the evidence of D. L. Plumer, is the same as the notice contained on pages 89 and 90 of said original records; and that Exhibit 8, offered in connection with the evidence of said D. L. Plumer, is the same as the trust deed set out in the original records on pages 95 to 110 inclusive, purporting to be a trust deed from the Sioux City Terminal Railroad & Warehouse Company to E. H. Hubbard, trustee, which was executed, delivered and recorded December 23, 1893.

And it is agreed that the said copies of said three Exhibits in connection with this stipulation may stand in lieu of and with the same force and effect as the originals offered, and that said originals may be withdrawn.

TRUST CO. OF N. A.
By JOY, CALL & JOY,
Its Attys.

Filed Apr. 21, 1896. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

221 And on the 22nd day of Dec. A. D. 1893, the following procedings were had in said cause by said Court and entered of record on page 27 of Volume 2, of the records of said Court, to wit:

First National Bank of Montpelier, Vermont, et al.
No. 138. vs.
Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 22nd day of December A. D. 1893, on application of The Trust Company of North America, Intervener herein, it is hereby ordered that T. C. Leggett, upon giving bond as hereinafter provided, is hereby appointed a collector of the rents under the sub-leases of the property of the Terminal R. R. & Warehouse Co., with full power and authority to enforce the collection of said rentals by suit or otherwise, as may be necessary, and to make temporary leases for the use and occupation of portions of said property or improvements

thereon for business or other like purposes, such leases to be subject to the approval of Warwick Hough Receiver of the said Terminal Co., but not to make any lease to R. R. Co's for the use of said terminals, and the said T. C. Leggett shall give a bond for the use of all persons in interest in the sum of ten thousand dollars ($10,000) with sureties to be approved by the Deputy Clerk of this Court, Western Division, and upon giving such bond, the said Warwick Hough, Receiver, and his bondsmen, are not to be responsible for collections made by said Collector.

The bond to be given by said collector taking place of the bond heretofore given by said Receiver as far as such collections are concerned, and the said Warwick Hough, Receiver shall not make any leases or agreements with R. R. Co.'s for the use of said Terminals without the authority of this Court, and on notice to said Trust Co. of North America, or its representatives or attorneys. All of the said rentals when collected by the collector herein appointed, shall be deposited with the Sioux National Bank of Sioux City, for the benefit of said Trust Co. of North America, if default shall be made in the payment of interest on the bonds secured by the mortgage given by said Terminal Co. to the said Trust Co., otherwise said funds shall be subject to the order of this Court. This order is made without prejudice to the right of any party in interest in said property or any part thereof and without prejudice to such other and further order of this Court as may be necessary to preserve said property and pay taxes or other charges thereon, and the expense of the trustee and collector and the said receivership and the order heretofore made appointing a receiver is modified as herein provided, all subject to the further order of this Court.

222 And on the 19th day of April A. D. 1894, the following proceedings were had in said cause, by said Court, and entered of record on page 36 of volume 2 of the records of said Court to wit:

The First National Bank of Montpelier Vermont et al.
No. 138. vs.
Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 19th day of April A. D. 1894, it being made to appear to the Court that Mr. T. C. Leggett, who was heretofore appointed collector of the rents and incomes of the Sioux City Terminal R. R. & Warehouse Co., has resigned his position as such collector, such resignation is hereby accepted by the Court upon the said collector's making full report of his action as such collector, which report is hereby ordered.

223 And on the 19th day of April 1894, the following proceedings were had in said cause, and entered on page 36 of Volume 2 of the records of said Court, to wit:

First National Bank of Montpelier Vt. et al., Plaintiff,
No. 138. vs.
Sioux City Terminal R. R. & Warehouse Co. et al. Defendants.

Now on this 19th day of April A. D. 1894, on application of the Trust Co. of North America, Intervener herein, it is hereby ordered that C. L. Joy, Esq., upon giving bond as hereinafter provided, is hereby appointed a collector of the rents under the subleases of the property of the Terminal R. R. & Warehouse Co., with full power to enforce the collections of said rentals by suit or otherwise, as may be necessary, and to make temporary leases for the use and occupation of portions of said property or improvements thereon for business or other like purposes; such leases to be subject to the approval of Warwick Hough, Receiver of the said Terminal Co., but not to make any leases to Railroad Companies for the use of said Terminals. And the said C. L. Joy shall give a bond for the use of all persons in interest in the sum of ten thousand dollars ($10,000) with sureties to be approved by the deputy Clerk of this Court, Western Division, and upon giving such bond, the said Warwick Hough Receiver and his bondsmen, are not to be responsible for collections made by said collector—the bond to be given by said collector taking the place of the bond heretofore given by said Receiver as far as such collections are concerned; and the said Warwick Hough shall not make any leases or agreements with Railroad Companies for the use of said Terminals without the authority of this Court and on notice to said Trust Co. of North America or its representatives or its attorneys.

All of said rentals when collected by the collector herein appointed shall be deposited with the Sioux National Bank of Sioux City for the benefit of said Trust Co. of North America, if default shall be made in the payment of interest on the bonds secured by the mortgage given by said Terminal Co. to the said Trust Co., otherwise said funds shall be subject to the order of this court, this order is made without prejudice to the right of any party in interest in said property or any part thereof, and without prejudice to such other and further order of this court as may be necessary to preserve said property and pay taxes or other charges thereon, and the expense of the trustee and its collector and the said Receivership, and the order heretofore made appointing a Receiver is modified as herein provided all subject to the further order of this Court.

224 And on the 20th day of June A. D. 1894, the following proceedings were had in said cause by said court and entered of record on page 77 of volume 2 of the record of said Court, to wit:

The Trust Company of North America
No. 142. Equity. vs.
Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 20th day of June A. D. 1894, this cause coming up before the Court, the several parties complainant and defendants appearing by counsel, thereupon the complainant, with leave of Court dismissed this action as to the defendants, The First National Bank of Shenandoah, Penn., The Lock Haven Trust and Safe Deposit Co., The First National Bank of Sharon, Penn., The Girard National Bank, of Penn., The First National Bank of Orwigsburg, Penn. and the First National Bank of Erie, Penn., and such dismissal having been duly filed and entered, thereupon the plea in abatement filed on behalf of S. J. Beach and Charles L. Weld, co-partners under the firm name of Beach & Weld, and on behalf of Hopper & McNiel, co-partners coming up for hearing and having been duly submitted were by the Court overruled to which ruling the said above named defendants duly excepted; and thereupon the demurrer to the bill filed herein on behalf of the Sioux City Terminal Railroad and Warehouse Company, Grant Breese & Co., The Western Tube Co. and John Sutton having been duly submitted to the Court, were by the Court overruled, to which ruling the said defendants duly excepted and thereupon it was ordered by the court that the several defendants have leave to file answers to the bill by the first Monday in August next.

And thereupon it appearing to the Court that the Bill herein is filed by the Complainant, The Trust Company of North America as Trustee in the first mortgage, executed by the Sioux City Terminal Railroad and Warehouse Company, upon its property, for the purpose of foreclosing said first mortgage. And it further appearing that on the 10th day of October A. D. 1893, there was filed in this court a bill wherein The First National Bank of Montpelier Vermont, The First National Bank of Kewaunee, Illinois; The Garretts County Bank, of Oakland Maryland; The Naumkeag National Bank of Salem Mass; the Central National Bank of Middletown Connecticut and First National Bank of St. Louis Missouri, are complainants and the Sioux City Terminal Railroad & Warehouse Company, The Union Loan & Trust Company and E. H. Hubbard Assignee thereof, and Warwick Hough and S. J. Beals, Receivers of the Sioux City & Northern Railroad Company are

defendants, the said bill being filed for the purpose of foreclosing a second mortgage executed by the Sioux City Terminal Railroad & Warehouse Company, upon substantially the property covered by the first mortgage to the Trust Company of North America; and it further appearing to the Court that the interests of all will be best subserved by having these proceedings of foreclosure carried through in one case;

It is therefore ordered that the proceedings last named for the foreclosure of the second mortgage upon the property be consolidated with these proceedings for the foreclosure of the first mortgage and that the several parties thereto complainants and defendants have leave to answer the bill herein filed, and to file all cross-bills necessary for the protection and enforcement of their rights, such answers and cross bills to be filed by the first Monday in August next.

And thereupon the application heretofore filed by the
225 complainant for the appointment of a Receiver to take control and possession of the mortgaged property coming up for hearing and being submitted to the Court, it is thereupon ordered by the Court that Warwick Hough, Esq., who was heretofore appointed Receiver by this Court in the proceedings brought for the foreclosure of the second mortgage as hereinbefore stated be continued as Receiver in these consolidated proceedings with all the powers, rights and authority conferred upon him by the order made in said cause for the foreclosure of the second mortgage, except as the same are herein modified or as they may be hereafter modified by the further order of this court, the bond heretofore filed by said Receiver to continue in force, provided the surety thereon shall in writing, to be filed by the Clerk of this Court, at Sioux City Iowa, consent to continue as surety for the acts of said Receiver under this order, and in case said surety shall not so consent, then said Receiver shall file a new bond in the amount heretofore fixed and properly conditioned and with a surety or sureties to be approved by the Court;

And it further appearing to the court that under the terms of the contract with the complainant the rentals from the mortgaged property are directly payable to and collected by the complainant, the Trust Company of North America.

And it further appearing that it is desirable to have some proper person living at Sioux City Iowa, in charge of the collection of the rents and to secure tenants and make temporary leases thereto, to the end that the property may be kept in use and the income be made as large as possible and the property be kept in renting condition;

Now therefore at the request of the complainant herein and with the consent of all the other parties hereto;

It is ordered that C. L. Joy, of Sioux City Iowa, who was appointed to collect the rents and income of the property by an order entered in the case brought to foreclose the second mortgage be continued in that capacity in these proceedings with full power and authority to collect all rents and incomes from said property and to make and execute for and on behalf of the Trust Company of North America Temporary leases of any portion of said property on such terms as he may deem proper, excepting leases to Railroad Companies or for Railway purposes which shall only be made with the approval of the Court after due notice to all parties in interest, and said collector is hereby further authorized out of the funds which he may receive from rentals collected to make such ordinary repairs as may be necessary for the preservation of the property and the improvements thereon, and also to pay the costs of insuring said property in such sums as he may deem sufficient and advisable and also to pay any taxes now or hereafter levied upon the property, and the remainder of the funds by him collected after deducting the necessary outlays including reasonable expenses, shall be paid to the Trust Company of North America to apply on the interest accruing on the bonds secured by the Trust deed executed to said company, the said collector from time to time to make report of his doings to this court.

And it is further ordered that the bond heretofore given by C. L. Joy shall stand as security herefor, provided the sureties thereon shall in writing to be filed with the clerk of this court consent to continuing as sureties under the order, but in case such sureties shall not thus consent, then said Joy shall file a new bond in the amount heretofore fixed and with surety or sureties to be approved by this court, it being further understood and ordered that the Receiver Warwick Hough and his bond shall not be held liable for any default of said C. L. Joy, collector nor for his failure to account for any moneys by him collected.

226 And on the 24th day of May, A. D. 1895, the following proceedings were had in said cause by said Court and entered of record on page 155 of volume 2 of the records of said Court, to wit:

The Trust Company of North America
No. 142. v.
The Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 24th day of May A. D. 1895, the above entitled cause coming on to be heard, on application of the solic-

itors for the complainant, the Trust Company of North America;

It is ordered by the Court that J. H. Bolton be and he is hereby appointed a special master of this Court to hear evidence and make report of account to this Court, showing amount of indebtedness due complainant, the said Trust Company, with amount of rentals received and charges and expenses incurred by the collectors heretofore appointed herein.

227 And on the 24th day of May A. D. 1895, the following proceedings were had in said cause by said Court and entered of record on page 154 of volume 2 of the records of said Court, to wit:

The First Nat. Bank of Montpelier Vt. et al.
No. 138. Eq. v.
Sioux City Terminal R. R. & Warehouse Co. et al.
and
Trust Company of North America
142. Eq. v.
Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 24th day of May A. D. 1895, comes the First National Bank of Shenandoah, Pa., by its solicitor, W. G. Sears, The Lock Haven Trust & Safe Deposit Co., Pa., The First National Bank of Sharon, Pa., The Girard National Bank of Phila., Pa., The First National Bank of Orwigsburg, Pa., and The Second National Bank of Erie, Pa., by their solicitors, Spalding, Taylor & Burgess, and make application to the Court to be made party defendants in the above entitled cause, in order that their rights and equities may be preserved, and there being no objections it is so ordered by the Court.

228 And on the 2nd day of July A. D. 1895, the following proceedings were had in said cause by said court and entered of record on page 223 of volume 2 of the records of said Court, to wit:

The Trust Company of North America
vs.
Sioux City Terminal R. R. & Warehouse Co. et al.

And now on this 2nd day of July A. D. 1895, it being the time heretofore fixed therefor, the above entitled cause came on for hearing upon the issue joined between the complainant the Trust Company of North America, and the defendant the Sioux City Terminal Railroad & Warehouse Company, the complainant appearing by A. F. Call, Esq., of the firm of Joy, Call & Joy, and the defendant appearing by J. C. Coombs, and H. J. Taylor of the firm of Spalding, Taylor & Burgess, and thereupon after the introduction of the evidence and the

argument of counsel, this cause is fully submitted to the Court and taken under advisement.

And on the 4th day of October 1895, the following proceedings were had in said cause by said court and entered of record on page 244 of volume 2 of the record of said Court, to wit:

The First National Bank of Montpelier, Complainants,
No. 142. Equity. vs.
Sioux City Terminal Railroad & Warehouse Company et al.
Defendants.
The Trust Company of North America Intervenor, Credits Commutation Company, Intervenor.

And now on this 4th day of October 1895, and prior to the final decree herein it is ordered and adjudged that the motion and petition of intervention of the Credits Commutation Company herein be allowed, and the said Credits Commutation Company is made a party to this action, and the evidence offered by it, to wit, the certified copy of the judgment of the Credits Commutation Company against the Sioux City Terminal Railroad & Warehouse Company and all pleadings and proceedings anterior thereto, of which certified copies are attached to said petition of intervention are admitted in evidence and the issues raised by said intervening petition will be heard and determined in connection with the final decree herein.

229 And on the 5th day of October 1895, the following proceedings were had in said cause by said Court and entered of record on page 254 of volume 2 of the record of said Court, to wit:

First National Bank of Montpelier, Vermont; First National Bank of Kewanee, Illinois; Garrett County Bank, of Oakland, Maryland; Naumkeag National Bank of Salem, Massachusetts; Central National Bank of Middletown, Connecticut; and Third National Bank of St. Louis, Missouri, Plaintiffs,
In Equity. vs.
Sioux City Terminal Railroad and Warehouse Company, Union Loan and Trust Company, E. H. Hubbard Assignee of the Union Loan and Trust Company and Warwick Hough and S. J. Beals, Receivers of the Sioux City & Northern Railroad Company, as their capacity and interest may appear, Defendants.

The Trust Company of North America, Plaintiff,
vs.
The Sioux City Terminal Railroad and Warehouse Company, Warwick Hough, Receiver of the Sioux City Terminal Railroad and Warehouse Company, The Union Loan

and Trust Company, E. H. Hubbard Assignee of the Union Loan and Trust Company, The Sioux City and Northern Railroad Company, Warwick Hough one of the Receivers of the Sioux City and Northern Railroad Company, Samuel J. Beals one of the Receivers of the Sioux City and Northern Railroad Company, The Manhattan Trust Company, The First National Bank of Montpelier, Vermont; The First National Bank of Kewanee, Illinois; The Garrett County Bank of Oakland, Maryland; The Naumkeag National Bank of Salem, Massachusetts; The Central National Bank of Middletown, Conecticut; The Third National Bank of St. Louis, Missouri; E. H. Hubbard, Trustee, Charles E. Faeth, Beach & Weld, a co-partnership, consisting of S. J. Beach and Charles L. Weld, R. & J. Barrett, a co-partnership consisting of Robert Barrett and James Barrett; Coughlin & Sullivan, a co-partnership consisting of Jeremiah J. Coughlin and Joseph H. Sullivan, J. H. Queal & Company; E. C. Wakefield, Sioux City Electrical Supply Company; E. A. Conway, Carr Ryder & Engler Company, W. H. Burns, Hornick Hess & More, Hopper & McNiel, a co-partnership consisting of Charles T. Hopper, and Henry C. McNiel, Sioux City Brick & Tile Works, Grant Breese & Co., a co-partnership, Gillette Herzog Manufacturing Company, John G. Olson, James D. Spalding, Hermann & Savage, a co-partnership consisting of Adolph Hermann and William H. Savage, Tom Ness, Fletcher & Hutchins Company, John Sutton, Fred. S. Martin; Webb Brothers, a co-partnership consisting of James D. Webb and Walter
230 I. Webb, A. Exkert, Ed. Moe, Peter Lorvig, L. C. Lancaster Gust Nelson, G. Davelaar, C. A. Nokes, F. Russell C. F. Nelson, C. Peterson, H. Wolf, D. Wolf, G. Ingebregtson, Osmond Olson, D. Payette, Louis Hanson, T. R. Hockinsmith, C. W. Lidster, Geo. Legvold, C. Seidel, Frank Draper, Paul Ekle, John Furre, Joseph Josselyn Oscar Lindblom, Ed. Marion, J. Nettum, John Ohlund, John Volz, L. Kaarkus, Louis Soiseth, H. Wood, Henry Soiseth, Geo. Robinson, Frank Wilson, S. Sorenson, E. Stran, F. Dewey, Martin Eide, Clarence Holt, M. Senfelder, VanBrunt & Howe, and J. A. L. Waddell, a co-partnership; The First National Bank of Shenandoah, Pennsylvania, The Lock Haven Trust & Safe Deposit Company; Bank of Lansing, T. P. Murphy, Dye Brothers, a co-partnership, First National Bank of Erie, Pennsylvania, First National Bank of Sharon, Pennsylvania; Girard National Bank of Philadelphia, Pennsylvania; The First National Bank of Orwigsburg,

Pennsylvania; The Kenduskeag National Bank of Maine; National Union Bank of Maryland of Baltimore, Maryland; Tolerton & Stetson Company, C. F. Hoyt, Martha Hoyt, Fidelity Loan and Trust Company; The Credits Commutation Company, Western Tube Company, Clarence S. Argo; Reel & Bartle, a co-partnership and William Watts, Defendants.

Consolidated as One Case.

DECREE OF FORECLOSURE.

And now on this 5th day of October A. D. 1895, these causes came on to be heard at this regular October Term A. D. 1895 of said Court on the pleadings, exhibits and evidence taken therein, and on the report of J. H. Bolton, Special Master and after hearing Joy, Call & Joy, counsel for the Trust Company of North America, and John C. Coombs and Spalding, Taylor & Burgess, counsel for the Sioux City Terminal Railroad and Warehouse Company, the Credits Commutation Company, Intervener E. H. Hubbard, Trustee, E. H. Hubbard, Assignee of the Union Loan and Trust Company for the First National Bank of Montpelier and other complainants it is ordered, adjudged and decreed, as follows:

1.

That on the first day of January 1890, the said Sioux City Terminal Railroad and Warehouse Company executed its six per cent. bonds numbered from 1 to 1250 inclusive of one thousand dollars each, and secured the same by a trust deed to the Trust Company of North America, as trustee, upon all of its property in Sioux City, Iowa, including all of its real estate and franchises then acquired together with all the property real, personal and mixed, which it might thereafter acquire within the said city of Sioux City, Iowa, including all leases, contracts and rentals and incomes and profits to be derived therefrom, said bonds are all outstanding due and unpaid together with interest from July 1st, 1893.

2.

That the property included in the said trust deed being the property then owned by the said Sioux City Terminal Railroad and Warehouse Company and thereafter acquired is more particularly described as follows:

231 All of block *twenty-six* (26) and all of *block twenty-seven* (27) all of block *twenty-eight* (28) all of block *twenty-nine* (29) all of block *thirty* (30) all of block *thirty-one* (31) except lots one (1) two (2) three (3) four (4) five (5) and six (6) and all of block

forty-four (44) in *Central Sioux City;* also the east half (E 1/2) of block *thirteen* (13); all of block *fifteen* (15) lots ten (10) eleven (11) and twelve (12) and the west third (W ⅓) of lots two (2) and three (3) in block *seventeen* (17) *Middle Sioux City*, lots one (1) and two (2) in block *twenty-five* (25) all of block *twenty-six* (26); lots two (2) three (3) four (4) five (5) six (6) ten (10) eleven (11) and twelve in block *twenty-seven* (27) lots one (1) two (2) three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) eleven (11) and twelve (12) in block *twenty-eight* (28) lots eight (8) nine (9) in block *twenty-nine* (29) *Sioux City East Addition*, together with all buildings and improvements thereon, and all railway lines, side-tracks, yards, passenger and freight depots, warehouses, storage-houses, elevator, and other terminal facilities erected thereon also all rights, privileges, franchises and leases of every kind and nature whatsoever, now held by the company, including the rights and franchises, and also the indenture of lease, dated the fourteenth day of December 1889, between the Sioux City Terminal Railroad and Warehouse Company, and the Sioux City and Northern Railroad Company, and all right, title and interest of the said Sioux City Terminal Railroad and Warehouse Company into and under the lease of the Sioux City and Northern Railroad Company therefor; also all property, rights and hereditaments of every kind and nature whatsoever, owned or held by said company within the corporate limits of Sioux City, Iowa, also lots one (1) two (2) three (3) four (4) five (5) and six (6) in block *thirty-one* (31) in *Central Sioux City*, lot eighteen (18) in block fifty-three (53) in *Central Sioux City*, lots one (1) seven (7) eight (8) and nine (9) in block twenty-seven (27) *Sioux City East Addition*, lot seven (7) in block twenty-eight (28) Sioux City East Addition; lots six (6) and seven (7) in block *twenty-nine* (29) *Sioux City East Addition* the north half (N. 1/2) and twenty-eight (28) feet off the south end of lots four (4) and five (5) in block *twenty-nine* (29) *Sioux City East Addition*, lots seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block *forty-two* (42), lots seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) twenty-four (24) and twenty-six (26) in block *forty-one* (41); lots seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block *forty* (40) except railroad right of way thirty (30) feet across block *forty* (40) all in *Central Sioux City.* That part of lots one (1) two (2) and three (3) in block *fourteen* (14) *Middle Sioux City*, lying between a line drawn parallel with and on the easterly side of the track known as the Oat Meal Mill Track, and fifteen (15) feet distant from the center line thereof, and a line drawn parallel

with and on the westerly side of the track known as the Union Stock Yards Track, and fifteen (15) feet distant from the center line thereof, also all that part of lots four (4) and five (5) in *block one* (1) *Middle Sioux City*, lying on the easterly side of a line drawn parallel with and fifteen feet distant from the center line of the track known as the Oat Meal Mill track; all that portion of the middle one-third of lots one (1) two (2) and three (3) in block *seventeen* (17) in *Middle Sioux City* lying northwesterly of a curved line drawn with a radius of nine hundred five (905) feet, and passing through the southwest corner of lot one (1) in block *twenty-seven* (27) and the southwest corner of block *seventeen* (17) in said *Middle Sioux City*, also all that certain piece or parcel of ground in *Central*
232 *Sioux City* known and platted as private park and bounded and described as follows: Bounded on the north by the south line of First Street on the east by the west line of Stueben Street, on the south by the north line of *Floyd City*, and on the west by the east line of *Middle Sioux City*, also all buildings, improvements and betterments thereon, including railway tracks, sidings, depots, warehouses, elevators and also including all rights and franchises and tracks located on the public streets, or alleys adjacent to said property and belonging to the said Sioux City Terminal Railroad and Warehouse Company, including one main line of railway track extending from Jackson Street to Howard Street through the alleys of blocks *sixteen* (16) *seventeen* (17) *eighteen* (18) *nineteen* (19) *twenty* (20) and *twenty-one* (21) of *Middle Sioux City* and block *twenty-five* (25) *Sioux City East Addition;* and also one main line of railway track along Second street from Jackson Street eastward to Clark Street and also one side track known as the Oat Meal Mill Track, diverging from the main track on Second Street, running in a southeasterly direction to the Oat Meal Mill, which is located on Clark Street between First Street and Grand Street, and also a one-fifth interest in, with the right to use, the side-track known as the Stock Yards track diverging from the main track on Second Street at Howard Street thence in a southeasterly direction to First Street and thence in an easterly direction along First Street to Prospect Street and thence in a southeasterly direction to the stock-yards and also including all leases belonging to the said Sioux City Terminal Railroad and Warehouse Company including the lease of all of the said Terminal grounds to the Sioux City and Northern Railroad Company for one hundred years at an annual rental of ninety thousand dollars ($90,000.00) a year, and also including all the rents and profits and incomes to be derived from the said property.

3.

That the following named persons, firms, and corporations, have or claim to have mechanic's liens upon a portion of the property embraced in the said trust deed in the amounts set opposite their respective names, to wit:

	C. S. Argo	$ 86.62
	R. & J. Barrett	1,289.37
	Beach & Weld	2,271.43
	W. H. Burns	6,285.00
	Carr Ryder & Engler Company	7,501.04
	E. A. Conway	543.69
	Conghlin & Sullivan	4,650.00
	Frank Dewey	24.50
	J. Davelarr	22.50
	Frank Draper	20.00
	Martin Eide	5.25
	Paul Ekle	21.26
	Fletcher & Hutchins Company	61.85
	Grant Breese & Company	690.20
	Hermann & Savage	195.17
	Hopper & McNiel	1,102.90
	Hornick Hess & More	743.23
	Louis Hanson	25.00
	T. R. Hockinsmith	27.37
	G. Ingerbregtson	27.37
	Joseph Josselyn	27.50
	L. Kaarkus	12.00
	George Legvold	13.06
	L. C. Lancaster	35.00
	Oscar Lindbolm	25.00
	C. W. Lidster	17.50
	Ed. Marion	27.37
	Ed. Moe	7.50
233	C. F. Nelson	22.50
	Gust Nelson	20.14
	J. Nettum	26.25
	C. A. Nokes	22.50
	John Ohlund	27.37
	D. Payette	27.37
	C. Peterson	24.50
	J. H. Queal & Company	285.53
	Reel & Bartle	19.25
	George Robinson	25.00
	F. Russell	38.50

Louis Soiseth	30.11
J. D. Spalding	11,125.09
John Sutton	2,809.55
Sioux City Electrical Supply Co	601.85
Sioux City Brick & Tyle Works	522.85
S. Sorrenson	7.50
E. Stran	7.50
M. Senfelder	13.00
John Furre	27.37
John Volz	27.37
E. C. Wakefield	51,010.84
H. Wolf	27.37
William Watt	25.00
D. W. Wolf	24.87
Frank Wilson	18.37
H. Wood	27.37
Western Tube Company	2,397.43
Webb Brothers	490.95
Gillette Herzog Manufacturing Co	12,835.51

and as to the aforesaid claimants, who are intervenors in this case there is no adjudication made at this time, and the amounts justly due the said intervenors and the priority of their claims over one another, and over the trust deed to the Trust Company of North America, trustee, is not here determined, but is held in abeyance to await the further order of this court, and out of the proceeds of the sale of the said property which is hereinafter provided, there shall be deducted the sum of eighty thousand dollars ($80,000.00) to be deposited with the United States Depository at Sioux City, Iowa, to be held subject to the order of this court for the protection of said mechanic's liens claimants until the validity amount and priority of the said mechanic's liens shall have been finally adjudicated and established. If on the sale of the property embraced in the said trust deed to the Trust Company of North America, trustee, as hereinafter provided, the said property should fail to realize a sufficient sum to pay the amount of the bonds with interest due or to hereafter accrue thereon together with the costs of this cause and to accrue, over above and aside from the eighty thousand dollars ($80,000.00) hereinbefore reserved, and if upon final hearing the said trust deed to the Trust Company of North America should be held to be a prior and superior lien upon all of the said property embraced therein to the said mechanic's liens and all and each of them, then and in that case, the fund so reserved shall be applied first to any deficiency existing upon the bonds and interest secured by the said trust deed, but if upon final hearing, the said mechanic's liens are held to be either all or in part superior and prior to the said trust deed

upon all or any of the property embraced therein, then a sufficient amount of the said fund so reserved shall be applied to the satisfaction of such claims so held to be prior and superior, and the remainder of the said fund, if any, shall be applied to any deficiency that may exist in the payment of the bonds and interest secured by the said trust deed.

4.

234 It is therefore ordered, adjudged and decreed, and this Court does hereby order, adjudge and decree that the defendant the Sioux City Terminal Railroad & Warehouse Company shall on or before the first day of December, 1895, pay into this Court or into the hands of the depository to be named by this Court, to the credit of this suit, the full sum of one million two hundred fifty thousand dollars ($1,250,000.00) with interest thereon at six per cent (6%) from the first day of July, 1893, until the said payment is made for the use and benefit of all the holders of the said six per cent. bonds issued under the said trust deed of January 1st, 1890, and for the use and benefit of all the holders of the said bonds and unpaid coupons, and also a sufficient sum of money in addition to defray the costs of this action, now earned or taxed or which may hereafter be fixed by this Court, including compensation of the receivers, collectors, counsel fees, and any other costs that may be ordered by the Court to be paid herein.

5.

It is further ordered, adjudged and decreed, that in default of such payment on or before the said first day of December, 1895, the said Sioux City Terminal Railroad & Warehouse Company, and all parties claiming under it, since the execution of the said trust deed of January 1st, 1890, with the exception of the mechanic's lien claimants above referred to, will be barred and foreclosed of all equity of redemption of in and to the said mortgaged premises, property, rights, assets, franchises, leases and contracts described or embraced in the said trust deed of January 1st, 1890, and every part and parcel thereof.

6.

It is further ordered, adjudged and decreed that in default of such payments on or before December 1st, 1895, all of the said mortgaged premises and property, real personal and mixed, rights, privileges, immunities, franchises, contracts and leases, shall be sold by the terms and in the manner following, to wit:

1st. A. B. Beall is appointed special master in chancery to direct and conduct the said sale.

2nd. The said master shall give public notice of the time, place and terms of the said sale by advertisement published not

less than five times a week for four consecutive weeks in one or more newspapers published at Sioux City, Iowa, and such other newspapers as the said master may deem proper.

3rd. The said sale shall be held at public auction in Sioux City, Iowa, at the front door of the Court House in and for Woodbury County, Iowa, situated in Sioux City, Iowa.

4th. The said master may adjourn the said sale from day to day or from week to week, giving such public notice as he may deem reasonable of such adjournment and may make the said sale at the time and place to which the same may be adjourned.

5th. On the consummation of the sale upon the terms and conditions thereof, and the confirmation of the Master's report of sale, by the Court, the said master shall make and deliver to the purchaser or purchasers thereof, good and sufficient deeds in law, conveying all of the property, real personal and mixed, so sold by him.

6th. The said Master shall offer for sale as one parcel all the property, real, personal and mixed the premises, rights, privileges, franchises, contracts and leases of every kind and description covered by the said trust deed of January 1st, 1890, and subsequently acquired, free and clear of all liens and incumbrances of any nature or kind whatsoever, excepting only the taxes that may be a lien upon the said premises.

7th. The said master shall, however, accept no bid for the property above directed to be sold unless the said bid
235 shall be at least the sum of one million dollars ($1,000,000.00) and in case such sum is not bid, he must forthwith adjourn the sale and apply to this Court for instruction.

8th. The master may require before accepting any bid that the person making the same shall deposit with him, a sum amounting to two per cent. (2%) of the said purchase to be deposited in the United States depositary at Sioux City, Iowa, subject to the order of this Court.

9th. The said master may fix the time for the final consummation of the said sale at a period not later than three months after the date thereof, which time may however be extended by consent of all the parties or by the order of this Court. At the time fixed by the said master for the consummation of the said sale and after the same shall have been confirmed by the Court, the purchaser or purchasers of the said property shall deposit the amount of their said bids in the United States Depositary at Sioux City, Iowa, to the credit of the master appointed for the sale of the said property, whereupon the said purchaser or purchasers shall be entitled to receive possession of the said prop-

erty so purchased by him or them, from the receiver and collector heretofore appointed in this case, who shall thereupon make delivery of the same. As soon as he is notified of the deposit of the purchase price aforesaid, the master shall publish for ten days in some newspaper in the city of Philadelphia, Pennsylvania, a notice fixing the time when he will be ready to pay in whole or in part, the bonds and coupons entitled to be paid out of the said sale, and fixing in said notice the time and place of consummation of said sale. The United States Depositary shall pay such bonds or coupons or the pro rata due thereon on the surrender and delivery of such bonds and coupons, accompanied by the master's order or certificate that they are to be paid. If the bonds and coupons are paid in full they shall be cancelled by the said master, if they are only partially paid they shall be so stamped and returned to the owners thereof.

10th. In case the purchaser or purchasers shall fail to comply with the terms of the bid or with any other order of this Court relating to the consummation of the purchase or to any payment or part payment to be made on account thereof, then the sums paid in by such purchaser or purchasers shall be forfeited as a penalty for such non-compliance. If any sale, for which a deposit has been made be not confirmed by the Court, such deposit shall be returned to the bidder or bidders.

11th. The bonds secured by the said trust deed of January 1st, 1890, to the Trust Company of North America, and overdue coupons belonging thereto, shall be received by the said master on account of amounts to be paid on the purchase of the said mortgaged premises, at such price or value as would be equivalent to the distributive amount that the holders of the said bonds and coupons would be entitled to receive in case the entire amount of the bid were paid in cash; provided, that any purchaser shall be required to pay into Court the sum of eighty thousand dollars ($80,000.00) hereinbefore reserved, together with such additional amounts in cash as may be necessary to provide the costs, fees and expenses to be fixed by the Court.

12th. If any purchaser or purchasers shall fail to comply with the terms of their bid or to complete the said purchase, the said master may, with or without further application to this Court again advertise the mortgaged premises for sale, and sell the same on the same terms and conditions as are hereinbefore stated.

7.

It is further ordered, adjudged and decreed, that the entire fund to arise from the sale of the said premises shall be
236 applied as follows:

1st. To the payment of the costs of this cause, and of all proper expenses attendant upon the said sale or sales, including the compensation of the special master appointed to make the same and of all charges, compensation, allowances and disbursements of the Trust Company of North America, trustee, and its attorneys, solicitors and counsel, and of their receivers and their counsel and solicitors, respectively, and all such other proper allowances, compensation and disbursements to parties and their counsel as may be directed to be paid by the order of this Court; all of the payments to be made under this provision, shall be hereafter fixed and allowed by this Court or a judge thereof.

2nd. Out of the remainder of the said sums shall be deposited the sum of eighty thousand dollars ($80,000.00) reserved to protect the mechanic's liens as hereinbefore provided, which shall be deposited with the United States Depositary at Sioux City, Iowa, subject to the order of this Court when the said mechanic's liens are finally determined and the remainder of the said sum shall be applied to the payment of all of the said bonds and unpaid coupons thereon, the interest accruing thereon and to accrue thereon, which was secured by the said trust deed of January 1st, 1890 to the said Trust Company of North America, without priority or preference as between principal and coupons and interest in full, or ratably if the said fund shall not be sufficient to pay the said bonds and coupons in full, the balance if any shall be paid into court to the credit of this cause, subject to the further direction of this court; in case the said fund is not sufficient to pay the said bonds and coupons with interest in full, the said deficiency shall be reported to this Court by the said master, and thereupon the said Trust Company of North America, trustee, shall recover from the Sioux City Terminal Railroad & Warehouse Company a judgment for the amount of the said deficiency.

It is further ordered, adjudged and decreed that when delivery is made by the receiver and collector of the property herein ordered to be sold, to the purchaser or purchasers, they shall file their accounts with the special master, showing the surplus revenues then in their hands, and all their outstanding liabilities, liquidated and unliquidated, and the Court reserves all question as to the distribution of such surplus and as to the protection of the receiver and collector from the demands against them, pertaining to the management of the property.

8.

It is further ordered, adjudged and decreed that the purchaser or purchasers of the property herein and hereby ordered to be sold, shall after the delivery to them, hold, possess and enjoy the said mortgaged premises and property, and all the rights, privileges, immunities and franchises pertaining thereto as fully and completely as the said Sioux City Terminal Railroad and Warehouse Company held the same at the time of making the said trust deed on the first day of January, 1890, or at any time subsequent thereto, free and clear of all liens and incumbrances whatsoever, and free and clear of any and all claims of any persons holding by, through, against or under the said Sioux City Terminal Railroad & Warehouse Company.

9.

It is further ordered, adjudged and decreed, that any party to this cause, and also any intervening petitioner who has duly filed his petition herein, and also the receiver and collector appointed herein, may at any time appeal to this Court for further relief at the foot of this decree, as well as for such modifications thereof in respect to terms and conditions of the said sale or the distribution of the proceeds thereof or in respect to
237 any matter which may affect the rights of any parties to this cause, as may be just and proper.

O. P. SHIRAS, Judge.

238 And on the 15th day of August, 1895, there was filed the opinion of the Court in this cause, which said opinion is in words and figures following, to wit:

239 In United States Circuit Court in and for Northern District of Iowa. Western Division.

First National Bank of Montpelier
Equity. vs.
Sioux City Terminal Railroad and Warehouse Company, Defendant.
Trust Company of North America, Intervenor.

Bill for foreclosure of mortgage filed by Trust Company of North America, Trustee.

Submitted on pleadings and proofs.

JOY, CALL & JOY,
For Complainant.
JOHN C. COOMBS,
H. J. TAYLOR,
For Defendants.

SHIRAS, District Judge.

The Sioux City Terminal Railroad & Warehouse Company was incorporated under the laws of the State of Iowa in August, 1889, and by the articles of incorporation it was empowered to purchase grounds in Sioux City, Iowa, for railway terminal facilities and to construct the necessary freight and passenger depots thereon and to build and operate all the railway tracks, sidings, etc., needed for the use of the terminal facilities by any and all railroads coming into Sioux City, and with the further right to construct lines of railway in Sioux City & Woodbury County. The capital stock of the corporation was fixed at one million dollars, with the right to commence business when two hundred thousand dollars of stock should be subscribed.

The company acquired certain lands in Sioux City in the latter part of 1889, and in the years 1890-93 it constructed freight and passenger depots and warehouses thereon with the necessary railway trackage to render the same available for proper use, but the company never built or in any way acquired
240 any line or lines of railway except those placed on the terminal grounds in Sioux City. On the 1st day of January, 1890, the company executed a mortgage upon its property within the limits of Sioux City to the Trust Company of North America, as trustee, to secure the payment of one million two hundred and fifty thousand dollars, evidenced by one thousand two hundred and fifty bonds of one thousand dollars each. These bonds were sold in open market realizing from ninety to ninety-five cents on the face thereof and the proceeds were used in payment of the property purchased by the Terminal Company and in payment of the floating indebtedness of the company, evidenced by notes of the company previously issued and negotiated through the Union Loan & Trust Company of Sioux City.

The interest upon these bonds being in arrears, the Trust Company has filed a bill in the present case seeking a foreclosure of the mortgage. Prior to the filing of this bill, the Terminal Company had executed a deed of assignment of all of its property to E. H. Hubbard, for the purpose of securing payment of its then outstanding notes negotiated through the Union Loan & Trust Company amounting to about $750,000. In answer to the bill of foreclosure filed by the Trust Company of North America, Hubbard as assignee, and the Terminal Company aver that the mortgage sought to be foreclosed and the bonds secured thereby are invalid and void on several grounds the first being that under the statutes of Iowa the Terminal Company had no power to incur an indebtedness in excess of two-thirds of its authorized capital stock; that the capital stock of the company was fixed in the articles of incorporation at

$1,000,000; that the mortgage and issue of bonds covered thereby are for $1,250,000 and that as the statutes of Iowa limit the amount of indebtedness to two-thirds of the capital stock, with certain exceptions named in the statute the Terminal
241 Company had no power to give a mortgage for a sum in excess of two-thirds of its authorized capital stock.

The Terminal Company was created under the provisions of Chapter 1, Title IX of the Code of Iowa and Chapter 139 Acts of 20th General Assembly. By the 13th article of its charter, it is provided that "the highest amount of indebtedness to which this company shall at any one time subject itself, shall not exceed two-thirds of the amount of the paid-up capital stock of the company, aside from the indebtedness secured by mortgage upon the real estate of the company."

Section 1611, McLains' Code of Iowa, provides that "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject which must in no case, except in that of risks of Insurance Companies, exceed two-thirds of its capital stock. Provided, that the * * * Provided further, that the provisions of this section shall not apply to the debentures or bonds of any company duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon." For the common benefit and protection of the creditors and stockholders of corporations created under the provisions of Chapter 1, Title IX, of the Code of Iowa, it is first enacted that the limit of authorized indebtedness is fixed at two-thirds of the capital stock, but by the second proviso it is declared that this limitation shall not apply to debentures or bonds secured by a first lien upon unincumbered real estate, worth at least twice the amount loaned thereon. The theory of this section seems to be, that if bonds of the corporation are secured upon
242 real estate worth at least twice the amount loaned thereon, they will be paid out of this security, and thus there will be left for the benefit of other creditors, the security derived from the capital stock of the corporation and therefore in ascertaining whether the amount of indebtedness to which a corporation may lawfully subject itself under the first para-

graph of the section, has or has not been exceeded, such secured bonds are not to be taken into account. It has been suggested in argument that a mortgage or trust deed, executed by a debtor corporation upon realty owned by it, does not come within the terms of the proviso, and that it is only bonds secured by the transfer of other notes, bonds, debentures or like evidences of debt secured upon realty, not belonging to the debtor corporation, which are intended to be excepted out of the operation of the first clause of the section. It is not to be denied that the language of the proviso gives plausibility to this contention, yet I do not deem it to be the proper construction thereof. The trust deed in question in this case is a real estate security. The execution and delivery thereof to the trustee was an actual transfer of a real estate security for the benefit of the purchasers of the bonds described in it, and it thus comes within the class of securities described in the paragraph in question.

It thus seems clear, that under the provisions of the Articles of Incorporation of the Terminal Company, read in connection with the provisions of the Code of Iowa applicable thereto, the bonds in question cannot be held void, simply because in amount they exceed two-thirds of the authorized capital stock of the company, for the reason that they are bonds secured by the transfer to the trustee of real estate security, to wit: a trust deed equal in amount to the par value of the bonds secured thereby. But it is said that the trust deed is not a first lien upon unincumbered real estate within the requirements of the statute, because of the existence of a lease of the Ter-
243 minal property made by the Terminal Company to the Sioux City & Northern R. R. Company, for a period of one hundred years at the yearly rental of ninety thousand dollars. This lease bears date of December 14th, 1889, whereas the trust deed sought to be foreclosed is dated January 1st, 1890, but the provisions of the two instruments show that they were executed with relation to each other, are in that sense in *pari materia* and must be construed together, in ascertaining the right and priorities created thereby. Thus it is recited in the lease that "whereas, the said Terminal Company, party of the first part, has been vested with power by its stockholders, and board of directors to execute and deliver, and will execute and deliver its first mortgage to the Trust Company of North America, of Philadelphia, Pennsylvania, to secure bonds to an amount not exceeding one million two hundred and fifty thousand dollars, which mortgage is to cover, embrace and include all of the real estate of said Terminal Company and all the rights of way, franchises, and all rights, acquired under and by virtue of the said ordinances, assignments and transfers aforesaid and whereas, it is further provided in said mortgage, under

said power given as aforesaid, that so much rental in this lease provided as shall be necessary to pay the interest upon said bonds, and the necessary costs of trusteeship, shall be paid in quarterly installments, to the trustee in said mortgage named" and based upon these recitals the lessee expressly covenants to pay to the Trust Company of North America seventy-five thousand dollars yearly to apply in payment of the interest of the bonds issued by the Terminal Company, and also so much additional as might be needed to pay the costs of the trusteeship, it being further provided that in case there should be a failure to pay any part of the stipulated rental, or to pay the interest or principal of the bonds of the Terminal Company, then the rental coming due from the railroad company as original
244 lessee, or from any subtenants should be payable to the trustee in the mortgage for the benefit of the bondholders secured thereby.

In the trust deed are found similar recitals touching the lease, and in the granting clause, the lease itself is described as part of the rights and property mortgaged for the payment of the bonds. It thus appears that in no proper sense can it be said that the lease is a lien or incumbrance upon the property covered by the trust deed prior to that instrument.

To give a value to the Terminal property it was essential that it should be used by some railway for terminal purposes.

The company owning it was not operating any line of railway and therefore the property was without value, and no income could be derived therefrom, unless it was leased to a railway company or companies having lines entering Sioux City. If the trust deed had been first executed and recorded and then the lease had been executed containing the provisions now found therein in regard to the payment of rental to the trustee for the benefit of the bondholders could there be any question that a greatly increased value would thereby have been given to the mortgagee's interest in the property? The same increase of value is created by the lease as it was executed. Although bearing a date prior to that of the mortgage, it is evident from its terms that it was not intended to create any lien or interest antagonistic or superior to the mortgage. According to its terms the lessee is bound to pay to the trustee in the mortgage seventy-five thousand dollars annually, a sum sufficient to pay the yearly interest maturing on the mortgage bonds, and in addition a sum sufficient to pay the costs of the trusteeship. Furthermore, in case of a failure on part of the Terminal Company to pay either the principal or interest of its bonds, the lease is liable to be sold,

through a foreclosure of the mortgage, for the benefit
245 of the bondholders. In fact, the lease was made for the benefit of the bondholders, and does not create any lien or incumbrance that is paramount or superior to the mortgage.

The statute also requires that the bonds must be secured on realty worth at least twice the amount secured thereon. What the real value of the property covered by the mortgage is now or what it was when the mortgage lien thereon was created is very uncertain, and the opinion of witnesses would very greatly differ with regard thereto. The undisputed fact is that the bonds were sold in open market and brought in cash from ninety to ninety-five cents on the dollar, which demonstrates that the purchasers deemed the security to be ample. The evidence is not such that the Court can say that as values then were in Sioux City the security did not meet the requirements of the statute. But if it were true that the security for the bonds was less than that required by the statute, would that fact defeat the lien of the bonds upon the security actually given? In equity would not the bondholders be entitled to hold the security actually given and to enforce their bonds against it, even though they might be estopped from enforcing payment against the other property of the corporation?

The statute limits the indebtedness that may be lawfully created to two-thirds of the authorized capital stock and then provides that in estimating the amount of the indebtedness, bonds secured on unincumbered realty worth twice the amount secured thereon shall not be icludned.

The theory is that bonds thus secured will be paid out of the security and will not therefore come against the general assets of the corporation. Would not the full purpose of the statute be met by holding that in case bonds are sold based upon security that is not equal in value to that required by
the statute, the bondholders can hold the security actu-
246 ally given and enforce payment against it, but will be estopped in favor of other creditors from claiming payment from the other assets of the corporation? But however this may be, as already said, the evidence is not such as to show clearly that the bonds were issued in violation of the statute in this matter of the value of the security and therefore the mortgage cannot be held to be void on that ground.

It is further urged in argument that the published notice of incorporation of The Terminal Company stated the limit of indebtedness to be two-thirds of the authorized capital

stock, without containing the exception authorized by the statute and named in the 13 Article of Incorporation, to wit, of the bonds secured on realty. A failure to publish the statutory notice of incorporation does not invalidate indebtedness created within the statutory limit, but only renders the stockholders individually liable under the provisions of 1618 McLain's Code of Iowa.

If it be true that the notice published did not comply with the requirements of the statute, which however I do not hold, it would not follow that the Trust Deed and the bonds secured thereby are void for want of authority to issue them. The authority to issue them is found in the article of incorporation, read in connection with the statutes of Iowa, and is not dependent upon the character of the published notice.

As I gather the facts from the record there is not presented thereby many of the questions which have been so fully and ably presented by counsel in their oral and written briefs and arguments touching the doctrine of estoppel the defense of want of authority on part of the corporation to issue these bonds and other cognate questions, and I am, therefore, relieved from the duty of reviewing the authorities on these points.

The validity of the trust deed or mortgage is further questioned on the ground that the instrument executed was
247 never authorized by the corporation; that while it is true the board of directors did authorize the execution of a trust deed, the one in fact executed differs in many particulars from the one authorized and must therefore be held to be void. It cannot be questioned that the board of directors did expressly authorize the execution of a trust deed to secure bonds in the sum of $1,250,000; that the deed was executed; that subsequently the board of directors adopted the following: "Resolved, that the Trust Company of North America, Philadelphia, Trustees, under the mortgage made by this company, dated January 1, 1890, be authorized and they are instructed to deliver 1250 bonds of the denomination of $1,000.00 secured by said mortgage, to the order of A. S. Garretson," and the said Garretson was empowered to receive and sell the bonds for the benefit of the corporation, which was done. From this it appears that the board of directors knew of the execution of the trust deed of January 1st, 1890; that they recognized its validity and directed the sale of the bonds secured thereby and hence it must be held that if the trust deed as executed differs from that previously authorized by the board, such changes were recognized and approved by the board and the trust deed, as executed cannot

be said to have been executed without the knowledge, approval and consequent authority of the board.

It is further earnestly contended by counsel for defendants that the trust deed must be held to be void and not enforceable in equity, because it is repugnant to the rule against perpetuities. In Gray on Perpetuities, Sec. 201, the rule invoked is stated in the following terms: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." The theory of counsel is that the interest or estate created by the mortgage rests or is conditioned on the prior term created by the lease;
248 that the lease is for the period of one hundred years; that as the estate created by the mortgage may not take effect until the expiration of the lease, it must be held to be contrary to public policy because of the remote period which might thus elapse before the estate would vest.

If it were true that the lease created a prior estate and that the mortgage could not take effect and that no interest or estate thereunder could be created or conveyed until after the termination of the lease, which by its terms is for the period of one hundred years, then it might be that the objection urged would have force, but I do not deem this to be the true construction of the mortgage and lease in question. The lease, although earlier in date than the mortgage, does not in fact create an interest or estate to be enjoyed prior to the taking effect of the mortgage estate. The bonds secured by the mortgage mature in ten years from their date and if the interest and principal thereof were paid in accordance with the terms of the mortgage, the mortgage lien would be at an end. If, however, the bonds should not be paid as provided in the mortgage, then foreclosure proceedings could be had and by a sale under the terms of the mortgage, the fee title of the mortgaged property together with the lease itself could be conveyed to the purchaser. The existence of the lease would not in any manner prevent a foreclosure and sale, and thus a new title would be created under the mortgage. In other words the entire purpose of the mortgage could be fulfilled and the interest, lien or estate created thereby could be converted into a new title vested in another party, to wit, the purchaser at the foreclosure sale, within a period falling far short of the twenty-one-year limit named in the rule. The interest and rights created by the mortgage are not in abeyance until the termination of the lease, nor is the mortgage vested on the lease in such sense that the leasehold
249 forms a condition precedent to the existence or enforcement of the mortgage lien. The lien of the mortgage

took effect upon its delivery and recording and this lien can now be enforced according to the terms of the mortgage, by a foreclosure decree and sale and I therefore fail to see why a court of equity should refuse to enforce it on the principle of public policy underlying the rule against perpetuities, as the same exists at common law.

The statute of Iowa upon the subject Sec. 3091 McLain's Code declares that "Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter." In Todhunter v. D. M. I. & M. R. Co., 58 Iowa, 205, it was held that "The object of the statute is to prevent property from being taken out of commerce, and prevent it from being held without the power of alienation beyond the prescribed period." In that case the facts were that the DesMoines, Indianola & Missouri Railroad Company leased its line of railway to the Chicago Rock Island Pacific Railroad Company for the term of nine hundred and ninety-nine years, agreeing to pay as a rental thirty per cent of the gross yearly earnings to be used and applied in payment of the interest accruing on the bonds of the lessor. It was held that as the lessor could convey the fee title and the lessee could assign the lease, "and by uniting in a conveyance, the lessor and lessee may freely and without restraint convey both the fee and the leasehold interest" the lease, though for nine hundred and ninety-nine years, was not void. In the case now before the Court, as a foreclosure decree and sale under the provisions of the mortgage, will not only convey the fee title, but also the lease thereon, thus accomplishing all that the lessor and lessee could do in the Todhunter case, it is clear that the mortgage does not prevent an alienation of the property within the meaning
250 of the statute of Iowa as construed by the Supreme Court in the case just cited.

The evidence shows that the fact is not questioned that the bonds secured by the trust deed executed to the Trust Company of North America were sold for a fair value to different parties who bought them relying upon the security afforded by the trust deed in question, and I am not able to find in the provisions of the deed or in the facts of the case any reason why these parties should be deprived of the security upon the faith of which they bought the bonds and parted with their money which it is admitted was received by the Terminal Company.

I therefore find and hold that the Trust Company is entitled to a decree of foreclosure as prayed for.

Filed August 27, 1895. A. J. VanDuzee, Clerk.

251 And afterwards to wit, on the 18th day of March 1896, there was filed in the Office of the Clerk of said Court, in said cause, an Assignment of Errors, and a Petition for Appeal, which Assignment of Errors and Petition, are in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Consolidated case Numbers 138 and 142. Equity.

Assignment of Errors on appeal severally in behalf of Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, trustee, E. H. Hubbard, Assignee.

First National Bank of Montpelier, Vermont, et al., Plaintiffs,
vs.
Sioux City Terminal Railroad and Warehouse Co. et al., Defendants.

The Trust Company of North America, Plaintiff,
vs.
Sioux City Terminal Railroad and Warehouse Co. et al., Defendants.

On this 18th day of March, A. D. 1896, come the undersigned Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, E. H. Hubbard, Assignee of the Union Loan and Trust Company, appellants, by John C. Coombs and Henry J. Taylor, their solicitors and counsel, and each severally and separately for himself says that the decree in said cause is erroneous and against the just rights of each of these appellants and that there is manifest error therein for the following reasons:

1. Because the Court erred in decreeing that said Sioux City Terminal Railroad and Warehouse Company on January 1, 1890, or at any other time executed its said bonds numbered from 1 to 1250 inclusive or secured the same by the alleged trust deed to the Trust Company of North America, as trustee upon all of its property in Sioux City, Iowa.

2. Because the Court erred in not decreed that said trust deed purporting to be made by the said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America, dated January 1, 1890, and all the bonds pur-

porting to be secured thereby were each and all null and void, for that (a) the indebtedness represented by said bonds and trust deed, as a single indebtedness disclosed upon the face of each bond, exceeded in amount two-thirds of the capital stock of said Sioux City Terminal Railroad and Warehouse Company; (b) The Articles of Incorporation and notice thereof of the said Sioux City Terminal Railroad and Warehouse Company expressly limit the indebtedness to two-thirds of the paid-up capital stock of said Sioux City Terminal Railroad and Warehouse Company; (c) at the time of the execution of said mortgage there was no paid-up capital stock and only two hundred thousand dollars par value of said stock subscribed; (d) the total authorized capital stock of said company never exceeded one million dollars; (e) the laws of Iowa prohibit the incurring of so large an indebtedness by said Sioux City Terminal Railroad and Warehouse Company; (f) the pleadings in this case did not permit a recovery under any substituted equity but rest the recovery only upon the bonds and trust deed as contracts and as such they are invalid and void;
252 (g) it is against public policy and against the laws of Iowa to permit said Sioux City Terminal Railroad and Warehouse Company to mortgage either its real estate or its franchises owned at the time of said mortgage or subsequently acquired; (h) the said Trust Company of North America and each holder of said bonds from the first has had full knowledge and notice of the facts rendering the same ultra vires and void and were participants therein and acted in pari delicto.

3. Because the Court erred in decreeing that said alleged bonds were secured by a valid trust deed to the Trust Company of North America upon either the real estate, personal property or franchises of the said Sioux City Terminal Railroad and Warehouse Company.

4. Because the Court erred in not decreeing said bonds and trust deed from said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America invalid and void and of no force and effect and constituting no lien upon any of the properties, real estate or personal, of the said Sioux City Terminal Railroad and Warehouse Company.

5. Because the Court erred in not decreeing that said trust deed to said Trust Company of North America constituted no lien upon the real estate therein purporting to be described, at least to no greater extent than the reversion after the ex-

piration of the term of said lease to the Sioux City and Northern Railroad Company.

6. Because the Court erred in not decreeing that said alleged trust deed to the Trust Company of North America embraced no more than a reversion of said terminal property at the end of said term of said lease, named, with a right in the meantime after default only to collect rentals under existing sub-leases made by the Sioux City and Northern Railroad Company.

7. Because the Court erred in not decreeing that said alleged trust deed to the said Trust Company of North America constituted no lien upon or right to the franchises or any of them of the said Sioux City Terminal Railroad and Warehouse Company either owned at the time or subsequently acquired.

8. Because the Court erred in not decreeing the trust deed from said Sioux City Terminal Railroad and Warehouse Company to the Trust Company of North America invalid and void for that the evidence showed that said trust deed was never authorized by either the directors or stockholders of said Sioux City Terminal Railroad and Warehouse Company.

9. The Court erred in not decreeing said trust deed invalid and void as a lien upon any property, because there was no title nor interest left in said Sioux City Terminal Railroad and Warehouse Company after the execution of the lease to the Sioux City and Northern Railroad Company to which a mortgage could attach and constitute a lien upon the real estate or franchises of the said Sioux City Terminal Railroad and Warehouse Company, and that at most said alleged trust deed could constitute a mere assignment of rents.

10. The Court erred in not decreeing said trust deed from said Sioux City Terminal Railroad and Warehouse Company invalid and void, because there was in law as well as in fact no authority upon the part of the Sioux City Terminal Railroad and Warehouse Company to mortgage its real estate or personal property either then owned or subsequently acquired.

253 11. Because the Court erred in holding said trust deed to said Trust Company of North America valid as to franchises because the evidence showed that said Sioux City Terminal Railroad & Warehouse Company had no authority to mortgage its franchises either then owned or subsequently acquired.

12. Because the Court erred in not decreeing the said trust deed to said Trust Company of North America invalid and void under the rule against perpetuities or remoteness.

13. Because the Court erred in not decreeing said trust deed from said Sioux City Terminal Railroad & Warehouse Company to said Trust Company of North America invalid and void, because the leasehold estate for the full term of one hundred years was first carved out of the entire interest in all the property, that all there was left to mortgage was at most only a reversion, for in any event only such rights in the term could be mortgaged as the lessee should concede to the lessor, for it was expressly reserved by the lessee, the Sioux City & Northern Railroad Company, in the lease, that the lease should be destructible by the lessor alone, and should be indestructible by the mortgagee in any event, and that after default, before or after the foreclosure of the mortgage or even after re-entry by the lessor, mortgagor for breach of the covenants and conditions of the lease, the rights of the mortgagee in the term were to remain the same, to wit: the right only to collect the rents under the stipulation; because it is further demonstrated in the mortgage which the directors of the lessor company purported to authorize that no foreclosure of the mortgage should work a termination of the primary lease, but only a right to take assignments of the leases and collect rents under them; because the term of this primary lease for one hundred years was not to merge in the reversion as mortgaged; because the provisions in said mortgage on which said decree is based are shown by the evidence to have been interpolation wholly unauthorized by and not known to the Sioux City Terminal Railroad & Warehouse Company, its directors nor stockholders.

14. Because the Court erred in its decree, because the evidence showed that the mortgage to the Trust Company of North America contains no express power to sell and expressly prohibits powers not therein expressed, and because the evidence showed that the Court could sell nothing in foreclosure except at most the right to the reversion after the one hundred year term and the right to the rentals under existing stipulations.

15. Because the Court erred in decreeing that the Sioux City Terminal Railroad & Warehouse Company should, on or before the 1st day of December, 1895, pay into said court or into the hands of the depositary to be named by said court to the credit of this suit the full sum of one million two hundred fifty thousand dollars, with interest thereon at the rate of six per cent. from the 1st day of July, 1893, until the said payment is made for the use and benefit of all the holders of said bonds and coupons purporting to be issued under the said alleged trust deed of January 1, 1890.

16. Because the Court erred in decreeing that in default of such payment on or before the 1st day of December, 1895, the

said Sioux City Terminal Railroad & Warehouse Company and all parties claiming under it since the execution of said trust deed of January 1, 1890, with the exception of the mechanic's lien, claimants should be barred and foreclosed of all equity of redemption in said mortgaged premises, property rights, assets, franchises, leases and contracts described or embraced in said alleged trust deed of January 1, 1890 and every part and parcel thereunder.

17. Because the Court erred in decreeing that in de-
254 fault of such payments on or before the 1st day of December, 1895, all of said mortgaged property should be sold, either as in said decree stated or otherwise.

18. Because the Court erred in decreeing that upon the consummation of said sale and confirmation of the master's report thereof by the Court, the master should make and deliver to the purchasers, deeds conveying said property so sold by him.

19. Because the Court erred in decreeing that said master should offer for sale as one parcel all of the property, real, personal and mixed, the premises, rights, franchises, privileges, leases and contracts of every kind and description covered by said trust deed of January 1, 1890, and subsequently acquired.

20. Because the Court erred in not decreeing that said real estate so ordered to be sold should be subject to the right of redemption as by law provided.

21. Because the Court erred in not decreeing that such parts or parcels of said real estate as were not held for the use of said Sioux City Terminal Railroad & Warehouse Company either for railroad or terminal purposes, should be sold subject to the right of redemption.

22. Because the Court erred in decreeing that the purchasers of said property therein ordered to be sold should upon delivery to them as in said decree stated, hold, possess and enjoy such mortgaged property and all the rights, privileges, and immunities pertaining thereto, and in not decreeing that the owner of said property was entitled to possess the same during the period of redemption, and in not decreeing said property to be sold subject to the ordinary right of redemption, and especially of the real estate so sold, and more particularly of that portion of the real estate so ordered to be sold not purchased or held for the uses of defendant Sioux City Terminal Railroad & Warehouse Company in the performance of its duties to the public.

23. Because the Court erred in decreeing that said bonds and coupons purporting to be secured by the said trust deed

to the Trust Company of North America, were entitled to be paid out of the proceeds of the sale of said properties before any payments were made to these appellants or either of them.

24. Because the Court erred in decreeing that the said bonds and coupons should be paid in full out of the proceeds of said sale.

25. Because the Court erred in decreeing that the said bonds purporting to be secured by said trust deed of January 1, 1890, to the Trust Company of North America and overdue coupons belonging thereto should be received by said master on account of amounts to be paid on the purchase of said mortgaged premises.

26. Because the Court erred in decreeing that the entire funds to arise from the sale of said premises, after paying the costs of said suit and the expenses of said administration of said estate and foreclosure as shown in Division 1 of paragraph 7 of said decree, and depositing said eighty thousand dollars reserved to protect said mechanic's liens, should be applied by the master to the payment of all of said bonds and unpaid coupons thereon, with interest accruing thereon and to accrue thereon, in full or ratably if said funds should not be sufficient to pay said bonds and coupons in full.

27. Because the Court erred in decreeing that in case said fund is not sufficient to pay the said bonds and coupons with interest in full, the said deficiency should be reported to said Court by said master, and thereupon the Trust Company of North America should recover from the Sioux City Terminal Railroad & Warehouse Company a judgment for the amount of such deficiency.

255 28. Because the Court erred in decreeing that said alleged bonds were all outstanding, due and unpaid, together with interest from July 1, 1893.

29. Because the Court erred in decreeing a foreclosure, and in adjudging that said principal indebtedness to said Trust Company of North America was due, because the said bonds did not [provided] for the maturity of the principal indebtedness upon default, and because the act and conditions upon which the said default of said principal indebtedness could be based had not taken place at the time of the commencement of this suit.

30. Because the Court erred in not decreeing said lease from said Sioux City Terminal Railroad & Warehouse Company to said Sioux City & Northern Railroad Company wholly invalid and void.

31. Because the Court erred in not decreeing the right and lien of E. H. Hubbard, assignee of the Union Loan and Trust Company superior to the lien or interest of the Trust Company of North America in or upon the property or assets of said Sioux City Terminal Railroad & Warehouse Company.

32. Because the Court erred in not decreeing that E. H. Hubbard as assignee of the Union Loan and Trust Company, had a prior lien and interest in and upon all the property of the Sioux City Terminal Railroad & Warehouse Company and in and upon all of said bonds purporting to be secured by said alleged trust deed to said Trust Company of North America, prior to Trust Company of North America, trustee for that the said bonds were first by agreement and pledge collateral security to the continuing indebtedness represented by notes indorsed and negotiated by and through the said Union Loan & Trust Company and because the evidence shows that said bonds were wrongfully and fraudulently and without authority taken from said Union Loan & Trust Company, and because by agreement all the property and securities of said Sioux City Terminal Railroad & Warehouse Company were to be collateral security to said continuing indebtedness through said Union Loan and Trust Company.

33. Because the Court erred in not decreeing that the conveyance made by said Sioux City Terminal Railroad & Warehouse Company to said E. H. Hubbard trustee, after re-entry by said company for breach of condition of lease of its property to the said Sioux City & Northern Railroad Company, be sustained as passing a free and unincumbered lien, title and possession of all and singular the property of said Sioux City Terminal Railroad & Warehouse Company to said Hubbard for the purposes as in said trust declared.

34. Because the Court erred in not giving the possession and the rents and profits of the property for the remainder of the term of one hundred years to E. H. Hubbard, trustee.

35. Because the Court erred in not decreeing the interest and lien of E. H. Hubbard, trustee, in and upon the properties of said Sioux City Terminal Railroad & Warehouse Company and the assets thereof, superior to the interest and lien of the said Trust Company of North America.

36. Because the Court erred in not decreeing the lien or claim of the Credits Commutation Company a first and paramount lien or claim on the property and assets of the said Sioux City Terminal Railroad & Warehouse Company, and to be first paid out of the proceeds thereof.

37. Because the Court erred in not decreeing the right, lien and interest of the said Credits Commutation Company upon the property and assets of said Sioux City Terminal Railroad & Warehouse Company in priority of and superior to the lien interest or right of the said Trust Company of North America.

38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, to share at least pro rata with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Rail-
256 road & Warehouse Company properties.

39. Because the Court erred, even if priority should not be given to the claim of said Credits Commutation Company in the amounts of its said judgment as shown by the certified copy thereof offered in evidence and attached to its petition of intervention, in not decreeing that the properties, real personal and mixed, of the said Sioux City Terminal Railroad and Warehouse Company, described in said trust deed to said Trust Company of North America, or otherwise or the proceeds thereof, be held or applied for the use and benefit of the claim of said Credits Commutation Company in priority of the claim of said Trust Company of North America, or ratably with the claims of said Trust Company of North America, made in behalf of said alleged bonds, shares and share alike.

40. Because the Court erred in not decreeing that the Trust Company of North America should be limited absolutely to at least the proceeds of the sale of said properties purporting to have been described in said trust deed, and estopped and barred from claiming any right, share or interest in any other of the assets of said Sioux City Terminal Railroad & Warehouse Company derived from any source whatsoever other than the said sale, notable such assets as the proceeds acquired from rents and profits prior to said sale, and more particularly rents and profits received or earned prior to default of said alleged trust deed to said Trust Company of North America, to the end that said Trust Company of North America should receive at most only the actual proceeds of the sale itself of the said properties purporting to be secured by said trust deed and should receive no share whatsoever in any of the rents, profits or income received or earned or any other assets of said Sioux City Terminal Railroad & Warehouse Company or the receiver thereof prior to the date of the sale of said properties in said decree provided.

41. Because the court erred in not decreeing that said Trust Company of North America should be limited absolutely to the real estate securities described in its alleged trust deed and

should not be permitted to share in any of the rents, profits incomes franchises or other properties of said Sioux City Terminal Railroad & Warehouse Company.

42. Because the court erred in not decreeing that the Trust Company of North America should be limited absolutely to at least the real proceeds of the sale of the properties and especially to the real estate properties as they existed at the time of the execution of said alleged trust deed, and should be barred and estopped from receiving any share in any of the properties of said Sioux City Terminal Railroad & Warehouse Company not real estate securities described in said trust deed and then in existence, and should not receive any share in the proceeds of properties other than said then existing real estate securities and should not receive the proceeds of the sale of improvements upon said real estate of the said Sioux City Terminal Railroad & Warehouse Company either owned at the time of the execution of said deed or subsequently acquired, especially such improvements as warehouses, union depots and other improvements placed on said properties since the execution of said Trust deed.

43. Because the court erred in decreeing that it had jurisdiction of said suit.

Wherefore, these appellants severally pray, each for himself, that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayers of the respective pleadings of these appellants.

JOHN C. COOMBS,
Equitable Building.

257 JOHN C. COOMBS, of Counsel. Boston, Mass.

HENRY J. TAYLOR,
Sioux City, Iowa.

Solicitors for the Sioux City Terminal Railroad and Warehouse Company; Credits Commutation Company, E. H. Hubbard, Trustee and E. H. Hubbard Assignee of the Union Loan and Trust Company.

Indorsed: Nos. 138 and 142. Equity. Consolidated. First National Bank of Montpelier et al. vs. Sioux City Terminal R. R. and Warehouse Company et al. Assignment of Errors. Filed Mch. 18th, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

First National Bank of Montpelier, Vermont; First National Bank of Kewanee, Illinois; Garrets County Bank of Oakland, Maryland; Naumkeag National Bank of Salem, Massachusetts; Central National Bank of Middletown, Connecticut, and Third National Bank of St. Louis, Missouri, Plaintiffs;

vs.

Sioux City Terminal Railroad and Warehouse Company; Union Loan and Trust Company, E. H. Hubbard, assignee of the Union Loan and Trust Company; and Warwick Hough and S. J. Beals, Receivers of the Sioux City and Northern Railroad Company, as their capacity and interests may appear, Defendants.

The Trust Company of North America, Plaintiff,

vs.

The Sioux City Terminal Railroad and Warehouse Company, Warwick Hough, Receiver of the Sioux City Terminal Railroad and Warehouse Company, The Union Loan and Trust Company, The Sioux City and Northern Railroad Company, Warwick Hough, one of the receivers of the Sioux City and Northern Railroad Company, Samuel J. Beals, one of the Receivers of the Sioux City and Northern Railroad Company, The Manhattan Trust Company, The First National Bank of Montpelier, Vermont, The First National Bank of Kewanee, Illinois; The Garrett County Bank of Oakland, Maryland; The Naumkeag National Bank of Salem, Massachusetts; The Central National Bank of Middletown, Connecticut; The Third National Bank of St. Louis, Missouri; E. H. Hubbard, Trustee, Charles E. Faeth, Beach &
258 Weld, a co-partnership consisting of S. J. Beach and Charles L. Weld; R. & J. Barrett, a co-partnership consisting of Robert Barrett and James Barrett; Coughlin & Sullivan, a co-partnership consisting of Jeremiah J. Coughlin and Joseph H. Sullivan, J. H. Queal & Company, E. C. Wakefield, Sioux City Electrical Supply Company; E. A. Conway; Carr Ryder & Engler Company; W. H. Burns, Hornick, Hess & More; Hopper and McNiel, a co-partnership consisting of Charles T. Hopper and Henry C. McNiel, Sioux City Brick & Tile Works; Grand Breese & Company, a co-partnership, Gillette-Herzog Manufacturing Company; John G.

Olson, James D. Spalding, Hermann & Savage; a co-partnership consisting of Adolph Hermann & William H. Savage, Tom Ness; Fletcher & Hutchins Company; John Sutton; Fred. S. Martin; Webb Brothers, a co-partnership consisting of James D. Webb and Walter I. Webb, A. Eckhert; Ed. Moe; Peter Lorvig; L. C. Lancaster; Gust Nelson, G. Davelaar; C. A. Nokes; F. Russel C. F. Nelson; C. Petterson; H. Wolf; G. Ingebregtson; Osmond Olson D. Payette; Louis Hanson; T. R. Hockinsmith; C. W. Lidser; Geo. Legvold; C. Seidel, Frank Draper, Paul Ekle, John Furre; Joseph Josselyn; Oscar Lindblom; Ed. Marion; J. Nettum; John Ohlund; John Volz; L. Kaarkus; Louis Soiseth; H. Wood; Henry Soiseth; George Robinson; Frank Wilson; S. Sorenson; E. Stran; F. Dewey; Martin Eide; Clarence Holt; M. Senfelder; VanBrunt & Howe; T. A. L. Waddell, a co-partnership, The First National Bank of Shenendoah, Pennsylvania, The Lock Haven Trust and Safe Deposit Company; Bank of Lansing, T. P. Murphy, Dye Brothers, a co-partnership; First National Bank of Erie, Pennsylvania; First National Bank of Sharon, Pennsylvania; Girard National Bank of Philadelphia, Penn., The First National Bank of Orwigsburg, Pennsylvania; The Kenduskeag National Bank of Maine, National Union Bank of Maryland, of Baltimore, Maryland; Tolerton & Stetson Company; C. F. Hoyt, Martha Hoyt, Fidelity Loan & Trust Company; The Credits Commutation Company, Western Tube Company; Clarence S. Argo, Reel & Bartle, a co-partnership, Credits Commutation Co., and William Watts, Defendants.

Nos. 138 and 142 Equity Consolidated.

PETITION FOR APPEAL.

To the Honorable Circuit Judges of the United States Circuit Court of Appeals for the Eighth Judicial Circuit:

Your petitioners, The Sioux City Terminal Railroad & Warehouse Company, The Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard assignee of the Union Loan & Trust Company, in the above entitled cause, each for himself would respectfully represent and show that in the above entitled cause pending in the United States Circuit Court in and for the Northern District of Iowa, there was entered at the October Term 1895, of said Court a final decree greatly to the prejudice of your petitioners, which said decree is erroneous and inequitable in many particulars.

Wherefore in order that your petitioners may obtain relief in the premises, and have opportunity to show the errors complained of, your petitioners severally and each for himself prays that he may be allowed an appeal in this cause to your Honorable Court and that the proper orders touching security required of him may be made.

March 18, 1896.

JOHN C. COOMBS,
25 Equitable Building, Boston, Mass.

JOHN C. COOMBS, of Counsel.

259 HENRY J. TAYLOR,
Sioux City, Iowa,
Solicitors & Counsel for Sioux City Terminal Railroad & Warehouse Company; Credits Commutation Company; E. H. Hubbard, Trustee, and E. H. Hubbard Assignee of the Union Loan & Trust Company.

Appeal allowed and security for costs fixed at $500.

AMOS M. THAYER,
Circuit Judge, 8th Circuit.

Indorsed: Nos. 138 & 142. Equity Consolidated. First National Bank of Montpelier et al. vs. Sioux City Ter. Ry. & Warehouse Co. et al. Petition for Appeal. Filed Mch. 18, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

And on the 23rd day of March 1896 there was filed in the office of the Clerk of said Court in said cause a Bond for costs, which is in the words and figures following, to wit:

Know all men by these presents, that we Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard trustee, and E. H. Hubbard, assignee of the Union Loan and Trust Company, principals, and F. L. Eaton, surety are held and firmly bound unto the Trust Company of North America, trustee, in the full and just sum of Five hundred dollars to be paid to the said Trust Company of North America, its successors or assigns, to which payment well and truly to be made we bind ourselves our heirs executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of March in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at the October Term 1895 of the Circuit Court of the United States for the Northern District of Iowa, Western Division, in a suit pending in said Court between the

said Trust Company of North America, plaintiff, and the Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard trustee, and E. H. Hubbard assignee of the Union Loan and Trust Company et al., defendants, a decree was rendered against said defendants, and the said named defendants have obtained a writ of appeal of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Trust Company of North America, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard Trustee, and E. H. Hubbard Assignee of the Union Loan and Trust Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void else to remain in full force and virtue.

260 But this instrument is only a bond for costs and not a supersedeas bond.

SIOUX CITY TERMINAL RAILROAD
[Seal] AND WAREHOUSE CO.,
By F. A. STODDART,
Secy & Treas.
CREDITS COMMUTATION CO.,
By F. L. EATON,
Secy & Gen. Mgr.

Sealed and delivered in presence of

H. J. TAYLOR.

E. H. HUBBARD, Trustee.
[Seal] E. H. HUBBARD, Assignee.
F. L. EATON, Surety.

The above bond is approved.

AMOS M. THAYER,
United States Circuit Judge.

State of Iowa,
Woodbury County—ss.

F. L. Eaton, surety on the within, being duly sworn deposes and says that he is worth, after paying his just debts, more

than fifteen hundred dollars, exclusive of property exempt from execution by the laws of the State in which he resides.

F. L. EATON.

Subscribed and sworn to before me by the above named F. L. Eaton, this 18th day of March, A. D. 1896.

[Seal] HENRY J. TAYLOR,
Notary Public within and for Woodbury Co., State of Iowa.

Indorsed: No. 138 & 142. Equity Consolidated. Trust Co. of North Am. vs. Sioux City Terminal & R. R. W. Co. et al. Cost Bond on Appeal. Filed March 23rd, 1896. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

261 United States Circuit Court, in and for the Northern District of Iowa, Western Division.

I, A. J. VanDuzee, Clerk of the United States Circuit Court for the Northern District of Iowa, do hereby certify that the foregoing transcript contains full, true and complete copies of all the evidence, pleadings, papers, exhibits, record entries and proceedings in the case of the Trust Company of North America, Complainant, vs. Sioux City Terminal Railroad & Warehouse Company et al., Defendants, Number 142 Equity, with which there was consolidated with it the case of First National Bank of Montpelier, Vermont et al., Complainants, vs. Sioux City Terminal Railroad & Warehouse Company, et al., Defendants, Number 138 Equity, as full, true and complete as the originals of the same so far as they relate to the controversy between the Trust Co. of North America and the Sioux City Terminal R. R. & Warehouse Co., E. H. Hubbard, Trustee, and E. H. Hubbard assignee et al., appellants, and demanded by the solicitors of the said parties now remaining on file and of record in my office, and I further certify that the original citation with the return of service indorsed thereon are hereto attached and returned herewith.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court in Sioux City, in the said Northern District of Iowa, this 11th day of May, A. D. 1896.

Circuit Court
U. S.
Northern District
of Iowa.
Sioux City.

A. J. VANDUZEE,
Clerk United States Circuit Court for Northern District of Iowa.

By J. H. BOLTON,
Deputy.

262 And afterwards to wit, on May 5th, A. D. 1896, there was filed in said cause the following agreement, to wit:

AGREEMENT.

It is hereby agreed between the appellants and appellee that the foregoing transcript contains all the papers, exhibits, stipulations, record, evidence, pleadings and all proceedings on which the said case was tried below, subject to the right of either party, should any part of said record in the court below be found to be inadvertently or otherwise omitted, to file an additional transcript thereof, in said Circuit Court of Appeals for the Eighth Circuit, at any time before the printed briefs therein are required to be filed by Defendant in Error.

SIOUX CITY TERMINAL RAILROAD
& WAREHOUSE COMPANY,
CREDITS COMMUTATION COMPANY,
E. H. HUBBARD, trustee,
E. H. HUBBARD, assignee,
By JOHN C. COOMBS,
HENRY J. TAYLOR,
Their solicitors.
TRUST COMPANY OF NORTH AMERICA,
By JOY, CALL & JOY,
Its solicitors.

Filed May 5th, A. D. 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Dpty.

Filed May 14, 1896. John D. Jordan, Clerk.

287 And on the fourteenth day of May, A. D. 1896, there was filed in the Clerk's office of said Circuit Court of Appeals, an appearance of Counsel for the Appellants in said cause, in the words and figures following:

In United States Circuit Court of Appeals, Eighth Circuit.

The Sioux City Terminal Railroad & Warehouse Company, E. H. Hubbard, assignee, E. H. Hubbard, trustee, and Credits Cummutation Company, Appellants,

vs.

The Trust Company of North America, of Philadelphia, Pennsylvania, Appellee.

PRECIPE FOR APPEARANCE.

The Clerk of said court will please enter our appearance as solicitors for appellants in above cause.

JOHN C. COOMBS,
No. 25 Equitable Bldg., Boston.
HENRY J. TAYLOR.
Sioux City, Iowa.
Solicitors for Appellants.

Indorsed: No. 801. United States Circuit Court of Appeals, Eighth Circuit. The Sioux City Terminal Railroad & Warehouse Company, E. H. Hubbard, assignee, E. H. Hubbard, trustee, and Credits Commutation Company, Appellants, vs. The Trust Company of North America, of Philadelphia, Pennsylvania, Appellee. Precipe for Appearance. Filed May 14, 1896. John D. Jordan, Clerk. John C. Coombs, Henry J. Taylor, Solicitors for Appellants.

288 And on the sixth day of July, A. D. 1896, an appearance of counsel for the Appellee was filed in the Clerk's office of said Circuit Court of Appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.
No. 801. May Term, 1896.

Sioux City Terminal Railroad & Warehouse Co. et al., Appellants,

vs.

Trust Company of North America.

The Clerk will enter my appearance as Counsel for the Appellee.

ASA F. CALL.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1896. No. 801. Sioux City Terminal Railroad &

Warehouse Co. et al., Appellants, vs. Trust Company of North America. Appearance. Filed Jul. 6, 1896. John D. Jordan, Clerk. Asa F. Call, Counsel for Appellee.

And on the twenty-first day of December, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896. Monday, December 21, 1896.

The Sioux City Terminal Railroad and Warehouse Co. et al., Appellants,
No. 801. vs.
The Trust Company of North America, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

289 This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry J. Taylor in behalf of Appellants, continued by Mr. John C. Coombs for Appellants and Mr. Asa F. Call for Appellee and concluded by Mr. Henry J. Taylor for Appellants. Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of Counsel filed herein.

And on the second day of August, A. D. 1897, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following:

290 United States Circuit Court of Appeals, Eighth Circuit. May Term, A. D. 1897.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard, Assignee of the Union Loan and Trust Company, Appellants,
No. 801. vs.
The Trust Company of North America, Appellee.

Mr. John C. Coombs and Mr. Henry J. Taylor for Appellants.
Mr. Asa F. Call for Appellee.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

The case is stated in the opinion.

Sanborn, J., delivered the opinion of the court.

This is an appeal by the mortgagor and subsequent lienholders from a decree of foreclosure of a first mortgage for $1,250,000 upon the property of the Sioux City Terminal Railroad and Warehouse Company of Sioux City, Iowa, hereafter called the Terminal Company. The appellants challenge this decree on many grounds.

At the threshold of the investigation, they meet the complainant with the charge that the court below had no jurisdiction of the case, because some of the defendants were citizens of the same state as the complainant. The complainant was the Trust Company of North America of Philadelphia, Pennsylvania (hereafter called the Trust Company), and it was a corporation of the State of Pennsylvania. It was the trustee for the bondholders secured by the first mortgage made by the Terminal Company, and it brought this suit to foreclose that mortgage on April 17, 1894. The Terminal Company was a corporation of the State of Iowa. The Trust Company made the Terminal Company and a large number of individuals and corporations parties defendant. Among the latter were several banks which had liens upon the mortgaged property subsequent to that of the first mortgage, and which were corporations of the State of Pennsylvania. On June 19, 1894, the Terminal Company and several other defendants demurred to the bill on the ground that the Circuit Court had no jurisdiction because the Pennsylvania banks were corporations of the same state as the complainant. On the next day, the complainant, by leave of the court, dismissed its suit as to the Pennsylvania banks, and the court on the same day overruled the demurrers, and consolidated with this suit another which had been previously brought in that court to foreclose a second mortgage upon the property of the Terminal Company. One of the defendants in the latter suit was a citizen of the same state as one of the complainants therein. On June 24, 1895, the Pennsylvania banks presented a petition in this suit in which they alleged that they had judgment liens upon the property and asked that they be admitted to the consolidated suit as parties defendant. Their request was granted and the suit then went to decree.

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The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have no interest in the litigation between the immediate parties but who have an interest in the subject-matter of the litigation which may be conveniently settled therein, may be made parties to it. The former are termed the necessary, and the latter the proper parties to the suit. The limitation of the jurisdiction of the Federal courts by the citizenship of the parties and the inability of those courts to bring in parties beyond their jurisdiction by publication, has

resulted in a modification of this rule and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter, which is separable from the interest of the parties before the court so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court or the suit will be dismissed. The complainant may join every proper party and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the court as to the parties before it, the suit may proceed without him and the decree will not affect his interests. Revised Statutes, Secs. 737, 738; Equity Rule 47; Chadbourne's Executors v. Coe, 10 U. S. App. 78, 83, 2 C. C. A. 327, 51 Fed. Rep. 479, 480, 481; Shields v. Barrow, 17 How. 130, 139; Ribon v. Railroad Companies, 16 Wall. 446, 450; Coiron v. Mallaudon, 19 How. 113; Williams v. Bankhead, 19 Wall. 563; Kendig v. Dean, 97 U. S. 423; Alexander v. Horner, 1 McCrary 634; The Cole Silver Mining Co. v. The Virginia and Gold Hill
292 Water Co., 1 Sawyer, 685. The Pennsylvania banks held judgment liens upon the mortgaged property later in date than, and inferior in equity to, the lien of the Trust Company's mortgage. They were not indispensable parties to the suit, because their interests were separable from those of the other parties to it, and a final decree which would do complete justice between them might be rendered without immediately affecting the interests of these banks. A decree of foreclosure in a suit to which they were not parties would have left their liens upon the equity of redemption unforeclosed and unaffected. Moreover, their joinder would oust the jurisdiction of the court as to the other parties to the suit, because they were corporations of the same state as the complainant. When this suit was commenced, therefore, the Trust Company had the option to join or to fail to join these banks as parties defendant, and the court had the right to proceed without making them parties, under the decisions which we have cited and under the 47th equity rule, which embodies these decisions and reads:

"In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

If the complainant had not joined these banks, the jurisdiction of the court would have been impregnable. Was it destroyed because the Trust Company made them parties defendant, and then with the leave of the court dismissed them from the suit? In Cameron v. McRoberts, 3 Wheat. 590, McRoberts, a citizen of Kentucky, brought a suit in equity in the District Court of the United States for the district of Kentucky, which then had the jurisdiction of a circuit court, and obtained a final decree. There were three defendants to this suit, one of whom, Cameron, was stated in the bill to be a citizen of the State of Virginia, but the citizenship of the others did not appear. A motion to set aside the decree was made on the ground that the court had no jurisdiction because the two defendants whose citizenship was not stated were in fact citizens of Kentucky. Two of the questions certified to the Supreme Court were: "Had the district court jurisdiction of the cause as to the defendant Cameron and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone?" The answer was: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." Courts do not require the performance of idle ceremonies. The Trust Company might have prevented this objection to the jurisdiction of the court by neglecting to join the Pennsylvania banks as defendants. The circuit court could have removed it by permitting the complainant to dismiss this suit and to
293 commence another against all the defendants except the Pennsylvania banks. No reason occurs to us why it might not have obviated it by permitting the complainant to dismiss the banks from this suit. Our conclusion is that the complainant in an equity suit in the Federal courts is not required to join any but indispensable parties to the suit when their joinder will oust the jurisdiction of the court, and if he does join them the court may permit their dismissal, and thereupon it has the same jurisdiction and power to proceed to a

decree in the case that it would have had if they had never been made parties to it.

Nor could the subsequent introduction of these banks and other parties into this suit for the purpose of protecting their own interests affect the jurisdiction of the court. When the banks had been dismissed the circuit court had jurisdiction of the subject-matter and of the parties to the suit. It also had the possession of the mortgaged property, which was then in the hands of its receiver. A suit which had been previously commenced in the same court was consolidated with this suit, and the Pennsylvania banks, on their own petition, were permitted to be made parties defendant to protect their own interests, but all these proceedings were ancillary and subordinate to this suit to foreclose the first mortgage, and all the parties thus brought into this suit were, in effect, interveners for their own benefit. It was immaterial that some of them were citizens of the same state as the complainant. Consolidations and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought into it may be. Phelps v. Oaks, 117 U. S. 236, 240; Stewart v. Dunham, 115 U. S. 61, 64; Hardenbergh v. Ray, 151 U. S. 112, 118; Freeman v. Howe, 24 How. 450; Krippendorf v. Hyde, 110 U. S. 276, 286; Central Trust Co. v. Bridges, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. Rep. 753; Society of Shakers v. Watson, 37 U. S. App. 141, 155, 15 C. C. A. 632, 638, 68 Fed. Rep. 730, 736. The objection to the jurisdiction of the circuit court cannot be sustained.

The mortgage on which this suit is based covers the franchises and all the property of the mortgagor. The appellants insist that the Terminal Company was a quasi public corporation and that it had no authority to make this mortgage, and they specially urge that it was without power to mortgage its franchises and after-acquired property. The Terminal Company is the creature of the State of Iowa. It was incorporated under the general laws of that state. It has the powers granted to it by those laws, together with those fairly incidental thereto, and it has no others. The Omaha Bridge Cases, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, 51 Fed. Rep. 309, 316. The statutes of Iowa then measure the powers of this corporation, and the construction of those statutes by the Supreme Court of that state and its determination of the extent of the powers and liabilities of corporations formed under them is authoritative in this court. When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the National courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved.

Madden v. County of Lancaster, 27 U. S. App. 528, 536,
294 12 C. C. A. 566, 570, 65 Fed. Rep. 188, 192; Dempsey v. Township of Oswego, 4 U. S. App. 416, 2 C. C. A. 110, 51 Fed. Rep. 97; Rugan v. Sabin, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; Travelers' Ins. Co. v. Township of Oswego, 19 U. S. App. 321, 330, 7 C. C. A. 669, 673, 59 Fed. Rep. 58, 61; Claiborne County v. Brooks, 111 U. S. 400, 410; Bolles v. Brimfield, 120 U. S. 759, 763; Detroit v. Osborne, 135 U. S. 492, 499. We turn then to the statutes and decisions of Iowa to learn whether this corporation was endowed with power to make this mortgage. When the Terminal Company was organized, the statutes of Iowa provided that any number of people might become incorporated for the transaction of any lawful business, including the construction, ownership, operation and maintenance of railways, bridges or other works of internal improvement, that a corporation so formed should have the power to make contracts, acquire and transfer property, and should possess the same power in such respects as private individuals enjoy, but should have no power not possessed by natural persons, except those expressly granted to it by those statutes (McClain's Annotated Code of Iowa, Secs. 1608, 1609 Subdiv. 6); that before commencing business the incorporators should adopt articles of association and publish a notice, which should state, among other things, the general nature of the business to be transacted (McClain's Code, Secs. 1610, 1611); that any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway should have power to issue its bonds for the construction and equipment of its railway and to secure their payment by executing mortgages or deeds of trust on the whole or any part of its property and franchises, and that such mortgages or deeds of trust might cover property acquired subsequent to their dates (McClain's Code, Secs. 1955, 1965, 1966); that any number of persons or of railroad corporations, or of persons and railroad corporations, might form themselves into a body corporate, under the foregoing provisions of the statutes, for the purpose of constructing and maintaining union depots for freight and passengers, and that such a corporation should have the power to acquire by purchase or condemnation such real estate as the Railroad Commission should deem necessary for their depot and its approaches. (McClain's Code, Secs. 2090, 2091.) According to the notice given by the publication of its articles of association under these statutes, the general nature of the business and the powers of the Terminal Company were "to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side tracks, depot yards, warehouses, storage houses, elevators, and all other needed terminal facili-

ties and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, * * * * and to mortgage, lease or sell the said grounds and improvements thereon." Under this state of facts, the argument of the appellants is, that this mortgage was ultra vires the corporation, because the Terminal Company was a quasi public corporation and had no implied power to mortgage its property, because the power to mortgage its franchises and after-acquired property was not claimed in its articles of incorporation, and because it was organized under sections 2090 and 2091, supra, relating to corporations to construct union depots, and
295 these sections give such corporations no power to mortgage their property. But this was not a corporation organized for the sole purpose of constructing union depots. On the other hand, the description of the general nature of its business in its articles of incorporation makes no reference to any union depot and expressly states that its business is, among other things, to construct and operate one or more lines of railway. Conceding, but not deciding, that a quasi public corporation has no implied authority to mortgage its property, such a corporation has express authority to do so under the laws of Iowa which we have cited (McClain's Code, Secs. 1608, 1609), and that power is not restricted or lost by a failure to claim it in the articles of association. The statutes of Iowa do not require the powers of a corporation organized under them to be enumerated in its articles, and an omission to claim any of these powers would not leave the corporation so organized powerless. Thus in Thompson v. Lambert, 44 Ia. 239, 243, the incorporators limited the objects of a county agricultural society to "the improvement of agriculture, horticulture, mechanic arts, rural and domestic economy." In answer to the contention that the society had no authority to mortgage its property because that power was not enumerated in its articles, the Supreme Court of Iowa said:

"The power to borrow money, execute notes and mortgages was neither assumed nor prohibited. In the absence of any such prohibitory provision, the power to borrow money, execute notes and mortgages, as evidences of and security for indebtedness created for the necessary and proper purpose of carrying out the objects of the corporation impliedly exists. For the purpose of effecting the objects of the corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited."

All doubt of the power of the Terminal Company to make this mortgage is, however, dispelled by the provisions of sec-

tions 1955, 1965 and 1966 of McClain's Annotated Code. They expressly authorize any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway to mortgage its franchises and all its property, whether acquired before or after the execution of the mortgage. The Terminal Company was certainly organized to construct and operate a railway, whatever other objects its corporators had in view, and under these provisions, it had express authority to make the mortgage in suit. Railroad Co. v. Howard, 7 Wall. 392, 412.

Another position of counsel for the appellants is, that this mortgage is void, because it violates the rule against perpetuities, which in Iowa is embodied in this provision of its statutes:

"Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter." McClain Annotated Code of Iowa, 1888, Sec. 3091. The argument in support of this position is founded upon this state of facts: On December 14, 1889, the Terminal Company leased to the Sioux City & Northern Railroad Company of Sioux City, Iowa, all its franchises and property for the term of 100 years for an annual rental of $90,000.

296 The lease recited that the Terminal Company had been authorized by its stockholders and by its board of directors to make a first mortgage on its franchises and property to the Trust Company to secure the repayment of an amount not exceeding $1,250,000, and that it was about to do so. It contained a permit to the railroad company to sublet the premises and covenants by the railroad company that it would pay $75,000 and as much more of its annual rental as should be necessary to pay the expenses of the trusteeship to the Trust Company, to be applied to the payment of the interest on the mortgage bonds and to the payment of the expenses of the trusteeship. It also provided that if the lessee failed to pay the rent, the lessor might re-enter and take all the rights and remedies of the lessee against the sub-lessees, and that if default should be made in the payment of the interest on the mortgage bonds, all those rights and remedies should inure to the benefit of the Trust Company or of the purchasers under the mortgage. On January 1, 1890, the Terminal Company made to the Trust Company the mortgage in suit, under the form of a trust deed, to secure the payment of bonds due in ten years to an amount not exceeding in the aggregate $1,250,000. This mortgage recited the lease to the railroad company and its provisions for the benefit of the

Trust Company and the bondholders. By its terms, the Terminal Company transferred and conveyed to the Trust Company all its franchises and property, including all its rights and privileges under the lease to the railroad company. The third article of the mortgage provided that the Terminal Company transferred to and vested in the Trust Company all the powers, rights and remedies which it had for the collection annually of the $75,000 and the expenses of the trusteeship, which the railroad company had promised to pay to the trustee by its covenants in the lease, that in case of a default of the Terminal Company in the payment of the bonds or the coupons, it would assign to the Trust Company its lease to the railroad company and the rentals due thereunder and that the Trust Company and the purchaser under the mortgage should be entitled to all the rentals from the sub-lessees. The sixth article of the mortgage gave to the Trust Company the option in case of default to take possession of the mortgaged property, to operate it and collect the income, rents and profits from it, until the principal and interest of the bonds were paid or until the property was sold. The seventh article declared that the provisions of the preceding article were cumulative to the ordinary remedy by foreclosure in the courts, that a majority of the bondholders might require the trustee to avail itself of this remedy and that in the absence of their direction, it might do so at its discretion. The ninth and tenth articles provided that the trustee might purchase at the foreclosure sale and that a majority in interest of the bondholders might control the exercise of every option given to the Trust Company by the terms of the mortgage. The position of counsel for the appellants is that this mortgage violates the rule against perpetuities, (1) because the lease and the mortgage in fact constitute a tripartite agreement which might suspend the power of the trustee and the bondholders to possess and convey the property mortgaged upon a condition precedent, to wit, the termination of the lease or the default of the lessee,
297 which might not be fulfilled until 100 years from the date of the lease, (2) because the provisions of the third and sixth articles of the mortgage for the collection by the trustee of the $75,000 and the expenses of the trusteeship annually from the lessee and for the assignment of the lease to the Trust Company by the mortgagor and the surrender to it of all the rights of the Terminal Company to the rents and income accruing under the lease, in case of the mortgagor's default, tend to prove the suspension of this power and to render the interest of the trustee too remote, and (3) because the powers given to a majority of the bondholders to control the exercise of the options allowed to the trustee in the mortgage have the same tendency. But there is nothing in these two instru-

ments but a lease for 100 years and a mortgage by the lessor of its reversion and of the rents accruing to it from the lessee to secure the payment of its bonds due in ten years. Gray says that the true form of the rule against perpetuities is that "no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Gray's Rule against Perpetuities, Sec. 201. But a vested interest is not subject to the rule against perpetuities, because it is vested and by its very nature it cannot be subject to a condition precedent. For this reason, reversions and vested remainders are exceptions to the rule, and leases for terms far longer than lives in being and twenty-one years are valid, both at common law and under the statute of Iowa, notwithstanding the suspension of the power of the lessors to take actual possession and to convey the property free from the lease. Gray's Rule against Perpetuities, Secs. 205, 736; London & South Western Railway Co. v. Gomm. 20 Chan. Div. 562, 574; Toms v. Williams, 41 Mich. 552, 572; Todhunter & Williamson v. The D. M. I. & M. R. Co., 58 Ia. 205, 207. When this is said, all is said. All the remoteness challenged in this case as obnoxious to the rule or the statute is due to the lease and not to the mortgage. The debt secured by the latter falls due by the terms of the bonds in ten years from the date of the mortgage, and the trustee and the bondholders are then entitled, if the debt is not paid, to take possession of and to sell and convey every interest which the lessor reserved under the lease. It is admitted that a mortgage of an unincumbered title to secure a debt due in ten years would not violate the rule. But this mortgage is not more obnoxious to it. The reversion, the right to the rents under the lease and the right to re-enter in case of the failure of the lessor to pay them were all valid in the hands of the lessor notwithstanding their remoteness. The only effect of the mortgage was to pledge as security remote but valid interests of the mortgagor and to give the right to the possession and sale of them if the debt and interest secured were not paid within ten years. If any of those interests were remote, they were made so by the lease and not by the mortgage, and they were valid because leases are excepted from the rule. The mortgage, therefore, did not offend against either the rule or the statute against perpetuities. Nor is it material whether the lease and the mortgage should be considered as separate instruments or as a single tripartite agreement. If the parties could have lawfully made the lease and the mortgage as separate instruments, a tripartite agreement between them which contained all the terms of the lease and the mortgage must be equally valid. The position that the mortgage and the lease or

either of them violate the rule against perpetuities must be overruled.

298 But the appellants insist that the mortgage is void, because the debt which it secures is in excess of the amount of indebtedness which the Terminal Company had the power to contract. The law of Iowa under which this corporation was organized provided that the incorporators must, before commencing any business, except that of their own organization, adopt articles of incorporation and that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock;" provided that these provisions shall not apply to certain classes of bonds, among which we concede for the purpose of this discussion and decision, but do not decide, that the bonds of this corporation do not fall. McClain's Code, Secs. 1610, 1611. The articles of incorporation of the Terminal Company declare that its authorized capital stock is $1,000,000 and that "the highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." Those articles, however, did not enlarge the powers of the corporation beyond those granted by the statutes under which it was created and, under the concession we have made, they gave it no authority to incur an indebtedness in excess of $666,667. A corporation may not enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its articles of incorporation. 5 Thompson on Corporations, Sec. 5996. The indebtedness secured by this mortgage was $1,250,000 and each bond recited that it was one of a series of bonds not exceeding in the aggregate $1,250,000 and that it was secured by a first mortgage upon the property of the Terminal Company. This debt was, therefore, in excess of the statutory limitation. The mortgage was duly recorded in the office of the proper Register of Deeds at Sioux City on February 27, 1890, and from that record and the terms of the bonds it is a fair inference that the Trust Company and the bondholders had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being. On the other hand, the bonds were sold on the credit of the mortgage for 90 per cent and 95 per cent of their par value and their proceeds were applied by the mortgagor to the payment of its debts and to the purchase and improvement of its property. Neither the bondholders nor the Trust Company were guilty of any fraud or bad faith in the transaction. The debt was not created nor was

the mortgage made or accepted with any intent to defraud any of the existing or subsequent creditors of the corporation. Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subsequent creditors any better standing to assail it? These are the crucial questions in this case.

This is a suit in equity. The Terminal Company has received the full benefit of the proceeds of these bonds and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers. The corporation had, as we have seen, the general power to borrow money and to secure its re-
299 payment by a mortgage. If the aggregate amount of the bonds secured by this mortgage had been $650,000 instead of $1,250,000, they would have been valid in the absence of other indebtedness. The bonds and mortgage did not, like the lease in Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania Railroad Co. v. St. Louis, Alton, &c., Railroad Co., 118 U. S. 290, 309; Oregon Railway & Navigation Co. v. Oregonian Ry. Co., 130 U. S. 1, 23, and Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 50, disable the corporation from performing its obligations to the government and to the public, nor were they, like those leases, beyond the scope of the general powers of the corporation that made them. The statute, whose provisions the bonds and mortgage violate, prescribe no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it and the debtor cannot usurp its functions. National Bank v. Matthews, 98 U. S. 621, 629; Fritts v. Palmer, 132 U. S. 282, 292; Logan County National Bank v. Townsend, 139 U. S. 67, 76; Thompson v. St. Nicholas National Bank, 146 U. S. 240, 251. The creation of this indebtedness and the execution of these bonds and this mortgage involve no moral turpitude. The articles of incorporation and the mortgage were spread upon the proper public records, so that all who subsequently dealt with the corporation could see what it had done. The bonds and mortgage had in them no element of fraud, deceit or misrepresentation. They were not evil in themselves. The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate

all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts and soon enough for him to set them aside when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains, nor is it any defense for a private corporation against the enforcement of an executed contract whose benefits it holds, that while its execution was within the general scope of its powers it involved an excessive exercise of one of them. While it retains the benefits of such a contract, it silently affirms and may not be permitted to deny its validity. National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99, 102; Humphrey v. Patrons' Mercantile Association, 50 Ia. 607, 610, 612; Garrett, Trustee, v. Burlington Plow Co., 70 Ia. 697, 701; Warfield v. Marshall County Canning Co., 72 Ia. 666, 672; Manchester & L. R. R. v. Concord R. R., 20 Atl. Rep. 383; Poole v. West Point Butter & Cheese Association, 30 Fed. Rep. 513, 520; Allis v. Jones, 45 Fed. Rep. 148, 150; Parish v. Wheeler, 22 N. Y. 494; Hays v. Galion Gas Light & Coal Co., 29 Oh. St. 330, 340; Bissell v. Michigan Southern and Northern Indiana Railroad Companies, 22 N. Y. 258; McCluer v. Manchester and Lawrence Railroad, 13 Gray 124; Bradley v.
300 Ballard, 55 Ill. 413, 418; Rutland & Burlington Railroad Co. v. Proctor, 29 Vt. 93. Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. In National Bank v. Matthews, supra, a bank had made a loan on the security of a note and a mortgage upon real estate under the form of a deed of trust, in violation of sections 5136 and 5137 of Revised Statutes and was proceeding to enforce collection of its debt by a sale under the trust deed, when one of the state courts enjoined the sale at the suit of one of the mortgagors, on the ground that the loan by the bank on real estate security was forbidden by law and the trust deed was void. The Supreme Court reversed that decree and allowed the bank to enforce its contract. In Humphrey v. Patrons' Mercantile Association, supra, the Supreme Court of Iowa compelled a corporation to pay to the guilty agent who had contracted it an indebtedness in excess of the limitation prescribed by the statute, and in Garrett, Trustee, v. Burlington Plow Co., supra, that court enforced the collection of a debt in excess of the statutory limitation against a corporation and in favor of its directors by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves. These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule

that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits, and repudiate the burdens of his contracts.

But it is said that the creditors of this mortgagor are entitled to a declaration that this mortgage is void and that they have rights here superior to the corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the State of Iowa whose standing in this respect is certainly as high as that of any of the creditors who have appealed. A brief statement, however, of the transactions out of which its claim has arisen will show, we think, that this position of its counsel is untenable. In the latter part of the year 1889, the Terminal Company commenced to issue its promissory notes for $5,000 each and to negotiate them through the Union Loan & Trust Company of Sioux City, a corporation which endorsed and sold them to banks located in the Eastern states. The proceeds of these notes were used by the Terminal Company to purchase and improve its property. Early in 1890, the aggregate amount of these notes had reached $1,250,000. It will be remembered that the Terminal Company made its lease to the Sioux City & Northern Railroad Company on December 14, 1889, and its first mortgage to the Trust Company on January 1, 1890. The bonds secured by this mortgage, with the exception of 250 of them which were disposed of in 1892, were sold early in the year 1890, and their proceeds were used to pay some of the Terminal Company's notes and to buy and improve its property. There were, however, some of its outstanding notes that were not paid, and as these fell due, the Terminal Company made new notes, the Union Loan & Trust Company endorsed and sold them and with their proceeds paid the notes which were falling due. In this way, the notes of the Terminal Company which were outstanding on April 25, 1893, were renewals of, or substitutions for some of the notes issued by that company in 1889
301 and 1890, but it does not appear that any of the banks which held the notes of the company in April, 1893, ever had any of the notes first issued for the original indebtedness of the corporation. The outstanding notes of the Terminal Company on April 25, 1893, aggregated $718,000. They were held by banks located in the Eastern states and none of them were made or dated earlier than January 1, 1892. In April, 1893, the Terminal Company made a trust deed of all its property to the Union Loan & Trust Company to secure the payment of these notes. This deed recited that it was subject to the mortgage in suit. The Union Loan & Trust Company, the trustee in this deed, subsequently made a general assignment of all its property and interests to E. H. Hubbard, as trustee. In December, 1893, the Terminal Company as-

signed all its property to E. H. Hubbard, in trust, to sell the same and apply the proceeds to the payment of its notes. The Credits Commutation Company subsequently became the owner of these outstanding notes of the Terminal Company to the aggregate amount of $616,000. It thereupon sued that company upon these notes in one of the state courts of Iowa, obtained a judgment for their amount and interest on July 23, 1895, had an execution returned unsatisfied and then intervened in this suit, which had been commenced in 1894. E. H. Hubbard, the trustee under the second mortgage and under the assignment of the Terminal Company, is one of the parties to this suit and one of the appellants in this case, so that the rights of the owners of these notes under their second mortgage of April, 1893, under their trust deed of December, 1893, and under their judgment of July 23, 1895, are all here for adjudication. But how can they establish any rights as against the first mortgage upon this property superior to those of the mortgagor? The equities of the appellants who own these notes cannot be higher than those of their original holders and they became creditors of this corporation subsequent to the sale of all but 250 of the bonds and probably subsequent to the sale of those. Subsequent creditors stand in the shoes of the mortgagor where the prior mortgage is not obtained and accepted by the mortgagees with intent to defraud them and this mortgage certainly was not. Graham v. Railroad Company, 102 U. S. 148, 153; Mattingly v. Nye, 8 Wall. 370; Sexton v. Wheaton, 8 Wheat. 229. Moreover, whether the holders of these notes became creditors before or after the bondholders did, they have established no right to attack this mortgage superior to that of the mortgagor.. They could maintain no superior equitable claim to attack it, unless they proved that the mortgage was made by the corporation and was obtained and accepted by the trustee and the bondholders with the intent to deceive and defraud them, and that it did deceive and defraud them, and there is no such evidence in this case. They have no legal lien upon the mortgaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors. Warfield v. Marshall County Canning Co., 72 Ia. 666, 670, 672; Garrett, Trustee, v. Burlington Plow Co., 70 Ia. 697, 700, 701, 702; National Bank v. Whitney, 103 U. S. 99, 103.

Another objection to the validity of this mortgage is that the president and secretary of the Terminal Company who executed it on behalf of that corporation had no authority to do so, because some of the provisions of the mortgage are not
302 identical with those contained in the resolution of the board of directors which authorized its execution. But

the Terminal Company delivered this mortgage to the Trust Company, signed by its president and secretary and sealed with its corporate seal. This was prima facie evidence that it was executed on behalf of the corporation by lawful authority. Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. Rep. 309, 327; Burrill v. Nahant Bank, 2 Met. 163, 166; Canandaigua Academy v. McKechnie, 90 N. Y. 618, 629; Wood v. Whelen, 93 Ill. 153, 162; Southern California, &c. Association v. Bustamente, 52 Cal. 192. The mortgage recited that it was duly authorized by a proper resolution of the board of directors, and each of the bonds recited that it was secured by a mortgage or deed of trust duly made and delivered to the Trust Company which was a first lien upon all the property of the Terminal Company. Upon these representations the Terminal Company sold these bonds and obtained their proceeds. It is too late now for this corporation or for creditors claiming under it through deeds or liens subsequent to the date of the record of this mortgage, to deny the power of its officers to make it. A corporation which induces lenders or purchasers to loan it money or to buy its bonds by delivering a mortgage formally executed, which purports to secure them, is thereby estopped from denying its validity on the ground that in giving its officers authority to make it it failed to comply with some law or rule of action, with which it might have complied, but which it wilfully or carelessly disregarded. Union Pacific Railway Co. v. Chicago, R. I. & P. Ry. Co., 10 U. S. App. 98, 188, 191; 2 C. C. A. 174, 239, 241, 51 Fed. Rep. 309, 326, 328; Zabriskie v. Railroad Co., 23 How. 381, 397, 400, 401.

Finally, the appellants assail the decree because it directs the sale of the mortgaged property as a whole and does not reserve to the mortgagor and to subsequent lienors the right of redemption from the sale in accordance with the provisions of the statutes of Iowa relative to sales of real property under execution. McClain's Annotated Code of Iowa, Secs. 4317, 4331. But this statutory right of redemption and right to a sale in separate parcels does not extend to the real estate of a corporation which is mortgaged with its franchise to acquire, hold and use property for public purposes and whose chief value depends upon its unity and its use for and appropriation to those purposes. Hammock v. Loan & Trust Co., 105 U. S. 77, 90. The decree below was right and it must be affirmed with costs. It is so ordered.

Filed August 2, 1897.

303 And on the second day of August, A. D. 1897, in the record of the proceedings of said Circuit Court of Ap-

peals is a decree in said cause, in the words and figures following:

United States Circuit Court of Appeals. Eighth Circuit.
May Term, 1897.

Monday, August 2, 1897.

The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard, Assignee of the Union Loan and Trust Company, Appellants,

No. 801. vs.

The Trust Company of North America, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, be and the same is hereby affirmed with costs; and that The Trust Company of North America have and recover against The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard, assignee of the Union Loan and Trust Company, the sum of twenty dollars for its costs herein and have execution therefor.

August 2, 1897.

And on the twenty-ninth day of September, A. D. 1897, a petition of appellants for a rehearing was filed in the clerk's office of said Circuit Court of Appeals, in said cause, in the words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

DECEMBER TERM, 1896.

No. 801, Equity.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN & TRUST COMPANY, APPELLANTS,

VS.

TRUST COMPANY OF NORTH AMERICA, TRUSTEE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

PETITION FOR REHEARING.

A rehearing is asked in this case. It is mainly for these reasons:

(1) The decision and grounds for it come somewhat in the nature of a surprise, and the appellants are not in fault for not having sufficiently anticipated them.

(2) It is thought that they may be the result of a failure on the part of the appellants to impress upon the Court

the force and significance of one of the assignments of error which the Court has apparently failed to consider, but which it is believed should materially modify the decree.

The opinion filed in the decision is careful of each point considered and comprehensive of nearly all. It discloses conviction on the part of the Court to an unusual degree.

Whether the demands of equity in a particular case should warrant a Federal Court in avoiding or impairing the laws on which the credit of incorporated enterprise in a state depends, was not considered by the Court, and is rather reserved than presented here, except to suggest that, in any stage of a case, such a Court might welcome concessions which would mitigate the rigor of such laws in their application in special instances, until the laws which, in themselves, are wholesome, may be more widely known, and their benefits realized and appreciated through observance. To that end it is submitted their violation should be discouraged, the Court inflicting as little hardship as some respect for them must necessarily impose.

For these reasons, a general rehearing on the whole case to reverse it, or in behalf of all the appellants, is not now sought. While none of the appellants waives his technical right, this request for rehearing is made practically only in behalf of the Credits Commutation Company, a judgment creditor.

Reargument is asked upon but one or two points, and, if granted and successful, would by the terms of this petition secure to the appellant only about a third interest in the properties involved, and that not in priority to, but in equality with, the complainants.

The rehearing is thus limited, and is asked in this Court in the first instance, rather than presented in behalf of the

larger claim to the Supreme Court on petition, because this Court has, as is disclosed in its opinion, a remarkably strong grasp of the case and an equally exceptional courage to do equity without precise precedent. A little reflection by this Court upon any point, with liberty to counsel to make brief suggestion of any error or omission, should be worth more than a first impression, on petition, of any other tribunal.

Perhaps, too, the more modest purpose of the judgment creditor may influence a higher respect for his argument by itself, and a readier willingness to examine our authorities more carefully, and to re-examine those that were thought to make against us.

Our principal point arises out of the most important, and the simplest question in the case, and one which, except as herein presented, was most earnestly considered by the Court.

The Court below had decided that the complainants' claim was lawful and valid, and could therefore be affirmatively enforced. The appellants assigned error to the ruling on which the decree was based. The assignment appears to have been sustained, but it is held here that the claim should nevertheless be enforced because "good faith, justice and equity" demand it.

We now urge that if the unlawfulness of the bonds and mortgage be established or conceded, the Court should have considered whether an offer to accept a compromise decree predicted upon such unlawfulness and made in behalf of the judgment creditor, and preserved in several assignments of error, and especially in the thirty-eighth, did not contain all the equity to which the bondholders are entitled from the judgment creditor; but which assignment

it is thought the Court may have overlooked, because the circumstances did not enable the appellant to show the basis of it on the record, and attention was called to it only orally at the hearing.

It was, in essence, an offer by the creditor to waive all liens, titles and priorities in his own behalf, if the mortgage should be found to be unlawful, provided the Court would impose like waiver on the mortgagee as a condition to any enforcement of its admittedly equitable but unlawful claim, and to the end that all creditors of the insolvent defendant Company might thus share equally and pro rata in its assets.

Before asking the Court to consider the extent or effect of this offer, the petitioner hastens to show to the Court the difficulties of pressing it more than we have done heretofore.

I.

THE OFFER COULD NOT HAVE BEEN EARLIER AND PERTINENTLY CONSIDERED.

It was anticipated that every Court of Equity should have an initial impulse to uphold these bonds, or to afford a relief equivalent to the mortgage, at least, as against the mortgagor. Every Court wants to do so simply.

Such a desire is a native vigor of equity and could be met in only two ways: first, by imposing insuperable legal bars; or, second, by yielding to the equity until its just requirements should be satisfied.

But the bonds, too, were in such counter plight that resort could be had to but two devices in their behalf:

First: To force a construction of the exception in

the proviso of McClain's Code, ss. 1610, 1611, and rule that that exception includes and validates the bonds. This would avoid all legal obstruction, and render consideration of the equities unnecessary and impertinent.

The Circuit Court took the dilemma on that horn, and, tried to so hold, but whether its opinion did this successfully, or was itself impaled, this Court expressly leaves undetermined, but is willing to concede the latter.

Second: To deny the validity of the bonds, but to enforce their obligations because "good faith, justice and equity demand it," and on the maxim that "he who seeks equity must do equity." That was the course adopted by this Court.

Again, there are two appellants, neither of them asking any equity of this Court, but both practically defendants, both represented by the same counsel, but having different purposes which various interests require to be preserved. They are the defendant company and the judgment creditor, the latter standing, formerly, on the conveyance made to Hubbard for its benefit, and now, also, on its judgment and the lien thereof.

It was for the interest of the defendant company to deny all indebtedness and liens, and to retain its property free from all obligations. The judgment creditor has always been willing to concede that this was without equity, and could be defended only as a matter of law.

The judgment creditor can only have the payment of his debt. He has no interest in the obligations of the bonds, or in any question of their validity. He is interested in the question of the validity and priority of the mortgage, but only in so far as it encroaches upon the assets or the lien of his judgment. He simply objects to

the enforcement of the mortgage against his own interests.

In the foregoing situation—comprehending either of the two decrees which the bondholders might attempt to obtain—one to sustain the validity of the bonds, or another for relief in equity equivalent to the mortgage, and the two expedients which might be tried to meet these attempts, and the different purposes of the two parties or defendants who had any interest to oppose the bonds or mortgage,—the case went to trial, and the Circuit Court sustained the validity of the bonds as within the exception in the proviso in the Code, ss. 1610, 1611.

Such a decision not only avoided all the legal barriers interposed by the defendant company, but eliminated all consideration of the equities as well.

There were forty-three assignments of error to the judgment, but all of these were, in appellants' brief, condensed to seventeen. All but the thirty-eighth assignment and those condensed with it in the appellants' brief as the fifteenth, were laid, in substance, against sustaining the validity of the bonds and mortgage, and against the jurisdiction of the Court to enforce them. The thirty-eighth assignment shows on its face that it came from the judgment creditor. Very likely it was both imcompetent and impertinent as it purported to surrender the defendant company's case, and the Court was still holding the bonds to be valid.

The experience of counsel in this case teaches them how extremely difficult it is to save consideration of any offer of a judgment creditor to do equity on the basis that the bonds are invalid, when the offer is made in the midst of a conflict between a bondholder who claims that the bonds are valid and entitled to all, and a defendant company that says the bonds are invalid and entitled to

nothing, and while the Court holds the bonds to be valid. In the two or three cases in which a judgment creditor's lien has seemingly been slighted, it was clearly because it was caught, as it is here, between such contestants. And, as in this case, the judgment creditor's willingness to take justice from equity—so that it would be an even hand—does not become pertinent until after the obligation of the bonds is found to rest in equity, and not in law, and that the holders are subject to the same golden rule from which was drawn the maxim on which they rely.

Perhaps on the record none of the assignments could run against anything but the validity of the bonds, for there was no other affirmative error in the decree. The briefs were confined to the assignments, and the arguments to the brief, except, as stated, that the senior counsel for the judgment creditor orally repeated in this Court the offer made in the Circuit Court, and on which the thirty-eighth assignment was based.

To show how strictly the appellants' brief was confined to the assigned errors which had to be maintained before any equities could appear, the appellants beg leave to quote from the brief filed by the complainant after the complainant had examined the appellants' brief. The complainant says :—

> "It has often happened that Courts in rendering decisions have not stopped to carefully weigh their words and have sometimes used the word 'void' when they meant 'voidable,' and perhaps in some of the decisions cited or in the dicta of the Court the word 'void' may have been used improperly. If it were true that this contract is void, a large number of decisions could be found which held to the doctrine that no recovery could be had upon it, and that the recovery, if at all, should be had on the common count; but if the contract were only voidable, the reason for such a ruling would fail and it could not obtain. A void contract is dead and no equitable inclination could give it life. There is nothing there to enforce

> and the Court is powerless to bring it into being, but a voidable contract may be valid under some conditions and void under others. The Court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the Court upon that question. It is not dead but simply in a position where, under some circumstances, it might be declared dead "
>
> *This distinction is wholly lost sight of in the argument of counsel for the appellants,* and it is the first question that ought to be settled in the determination of this case."

This was not a sight which the appellants had lost, for the distinction was never visible in the record. It was irrelevant to an assignment of error in holding the bonds to be valid under the exception in the proviso in the Code. It was irrelevant to the issues formulated, the right and the title alleged, the breach and grievance complained of, and the relief prayed for; all of which rested upon the alleged validity of the bonds, and a denial of any imperfection in them.

It is submitted that when a Court sustains a case as within a statutory exception to a general statutory rule to the contrary, that Court impliedly decides that if the case does not stand within the exception, then, by the rule, it falls. Assignments of error for not correctly ruling as to the fact, extent and consequences of the fall thereof, are not only impertinent, but impossible.

The appellants could not ask the Court below to rule that the bonds were "void," as distinguished from voidable, or that equitable inclination should not revive a moribund contract because it wasn't fit to live. The Circuit Court ruled that the bonds were valid; that cut out the equities, root and branch. In doing so, the Court erred, and that error was assigned, and the assignment has apparently prevailed.

The rule that requires an appellant to assign error was intended to reduce the record and narrow the issues. Although a general assignment of error in the judgment is most always laid, yet that alone would not bring up a case for review in case of any judgment, except on the pleadings alone, even if it would do so then. Much less does an assignment of error in such a judgment invoke all law and equity to see if there isn't some possible ground, other than the one to which error is assigned, on which the judgment could be sustained. Assignments confine both sides to the errors assigned by the appellant. The appellee cannot go outside of them unless he take a cross-appeal, which the appellee could not take in this case, for it had asked the Circuit Court to decide in its favor on the very ground the Court adopted.

It was therefore incompetent for the appellee, in its brief, which still upholds the decree on the grounds upon which it was granted, to say that the distinction between void and voidable bonds "is the first question that ought to be settled in this case."

We agree that that *is* the first question that *ought* to be settled, but it is submitted that we were not called upon to anticipate the distinction, in assignment and argument of error, in a decree which sustained the absolute validity of the bonds as within the statutory exception in the Code.

We also admit, in substance, as the complainant says, that "This distinction is (was) wholly lost sight of in the argument of counsel for the appellants." That is true; because the distinction was concealed behind the ground on which the complainant had based its decree. That ground had to be swept aside before anybody could look for the distinction, and if it may now be regarded, the

judgment creditor wants to be heard upon it; that is to say, upon what a Court of Equity should require as between the bondholders and the judgment creditor, on the basis that the bonds violate the statute, and for that reason are invalid, but that good faith, justice and equity demand their enforcement as against the defendant company.

The Court will appreciate how much more we desire this, because, after winning the assignments and demonstrating the invalidity of the bonds, we are held to have lost the case, and that, too, on a distinction which the complainant admits we did not touch, and which we submit the complainant had no right to expect us to consider.

II.

THE OFFER AND THE THIRTY-EIGHTH ASSIGNMENT OF ERROR.

The offer made in behalf of the judgment creditor was printed in the appellant's brief in the Circuit Court, as follows:

> "Should this mortgage be declared to be void and the conveyance to Hubbard allowed full priority to the exclusion of the bondholders, at least that great principle of justice founded upon equality, which equity first and always promulgated to govern insolvencies, would not be satisfied.
>
> A Court of equity has always the right to refuse to go on when its action in behalf of either party must necessarily do some wrong to the other. And it is for this reason that such courts have uniformly suggested compromises when the occasion called for them.
>
> To that end therefore, while praying that this mortgage may be declared null and void, we are willing to take a decree to that effect, conditioned upon the waiver or a declaration of nullity of the deed to Hubbard, so that all creditors of this Company shall share pro rata in the assets.
>
> Their (the bondholders) claims amount to a million and a quarter; ours to but little over half that, and it is not impossible that the property may be worth the sum of both.

> We do not think we are transgressing permissible suggestion when we say that in view of the prosecution of other enterprises inseparably connected with this one in which the interests we represent are now engaged, the share of which would fall to these bondholders will be made more valuable to them by our parties than is the whole property by our co-operation."

The offer was made without waiting to take the chances of getting more, and covered two-thirds of the entire interests at stake; and when made by an innocent creditor, standing to defend a valid and solid judgment of a Court of Law, to the conscious taker of an unlawful mortgage who can ask no legal but only equitable relief, the offer, it is submitted, deserves such consideration as should entitle the maker to be heard upon it, and to learn if it does not satisfy the requirement of the innate equities in behalf of the bondholders as against such creditor.

What is equity as between these two in this case is an open question.

The offer was persisted in, even after the Circuit Court had rejected the grounds upon which this Court bases its decree, and had been able to find for the complainant only upon a construction of the statutes which was palpably erroneous. The thirty-eighth assignment of error was based upon the offer, and is as follows:

> "38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, to share at least pro rata with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Railroad & Warehouse Company properties."

This error is also reflected in other assignments, and in appellant's former brief before this Court these assignments were condensed into what is therein designated assignment of error number 15. Said condensed assignment number 15 of appellants' brief is as follows:

"15. The Circuit Court erred in not permitting E. H. Hubbard, assignee and trustee, and especially the Credits Commutation Company, to share, if not in priority then pro rata at least, with the Trust Company of North America in the proceeds of the sale of the Terminal Company property."

Following this up at the hearing before this Court, the senior counsel for the appellants orally renewed the offer on which the assignment rested; but as the renewal was not contained in the brief before this Court, and as the brief in the Circuit Court which did contain it was not before this Court, it is conjectured that this Court did not keep it in mind; for it would not have failed of notice in an opinion so exhaustive otherwise of the equities of the parties. The judgment creditor now asks for an opportunity to renew it in review. This is the vitascope of the conscience in the case as it passes.

The conscionable consideration that prompted it was fear, from which is most all conscience.

But it was not fear that if these bonds were held to be unlawful they would also be enforced. It was made as an inducement to the Court not to strain the law in an endeavor to hold the bonds within it as the Circuit Court did—an open bribe to conscience so to satisfy it that it would not lead judgment into error.

It was made to meet this difficulty: The appellants deemed it impossible for the Court to invoke the maxim that "he who seeks equity must do equity," as against the defendant, or judgment creditor, for the seemingly conclusive reason that neither of the appellants was seeking equity or anything else from the Court. The defendant filed no cross bill, and the creditor could not intervene for any purpose but the protection of his own interest. Besides, his interest was legal and not equitable. Both

appellants even fought the jurisdiction from beginning to end. The maxim could not apply. For these reasons the creditor appellant thought that the equity must be tendered by him, and could not be exacted as a condition.

It was conceived that the rule that equity could ask nothing of a defendant might work an injustice. It is not true that a defendant can have affirmative relief in equity only by cross bill. It was clear in this case that the defendant would get affirmative and equitable relief by a purely negative answer if sustained.

So of the judgment creditor. If he were admitted simply to contest the complainant's mortgage, and were successful, the result would be that, though standing apparently upon the defensive or asking only for the dismissal of the bill, he would be let into a prior lien and would get everything, and the bondholders nothing; which inequality is inequitable in any case, and seemingly especially so in this case, where the validity of the mortgage is impeached because of its excessiveness, and the judgment creditor's claim adds $600,000 or $700,000 to that excess.

It is true, and it is of vast importance, that the judgment creditors did not know that their claims added to others, were, in the aggregate, excessive, and the bondholders did know that their own claim was so in itself, which, in conscience, supports the result that, in claims attacked for excessiveness, the more excessive may indeed be the more valid.

Nevertheless, the judgment creditor thought that to have the law sustained, he should eliminate inequitable results, for, after all, the contention between him and the bondholders was, as it stood, one for strict priorities, which are always distasteful to Courts of Equity, especially in

cases of insolvency. It was not an offer whose generosity was inspired by fear on the part of the offerer that he was not entitled to anything, and so should ask for but little; it arose from the fear that, though entitled to all at law, he would not get anything unless he conceded much to equity—all that was asked of him. It was premised upon the unlawfulness of the bonds which this Court has now found.

The offer is very large in amount. If the property was worth $1,250,000—and nobody thought less—the offer was worth at least $800,000. This Court will truthfully surmise that the conscience of the defendant company (in whose behalf the law seemed to be a bar) was considerably racked in behalf of the judgment creditor (in the minds of their common counsel) before any such concession could be made. Is it enough?

Assuming that the case is governed by the maxim that "he who seeks equity must do equity," what does that require of the parties?

It is adjudicated that good faith, justice and equity demand of the mortgagor a payment of his promise before he will be heard even to deny its validity.

As between the judgment creditor and the bondholder, neither of whom knew that the other existed, good faith, justice and equity require nothing except for this:—

The bondholders might have expected that there would be such creditors, but the creditors had statutory assurance that there could be no such bondholders without a violation of law such as the Court has found. The Court has also found that the bondholders were conscious of the violation, for the face of every bond disclosed and proclaimed it, and equity will keep in mind that it is the

enforcement of the violation, the very excess between what would have been valid and what is invalid, that leaves the creditor hopeless, utterly.

If it be conceded that the parties are equally honest, yet when one of two such must suffer from the violation of law by either, it ought not to be hard to determine which.

The judgment creditor was more cruelly deceived by false representations of security than were the bondholders, if it can be pretended that the latter were deceived at all, when they knew that they did not have any that was lawful.

The bonds and the notes are equally renewals of extensions of earlier notes, given in most instances, to the same holders.

The money of both went, alike and indiscriminately, into the property, and, without the contributions of each, it would not be sufficient to pay either, and is not enough to pay both.

In such cases, and in insolvency also, the ultimate rule for the determination of claims that may compete is that they are respectively entitled to such "proportion of the fund as they or those they represent may be supposed to have contributed to it."

Millers' River National Bank vs. Jefferson, 138 Mass., 112.

The contributors are the distributees.

This is a case of insolvency, and it is exactly in such cases that the maxim that "he who seeks equity must do equity," is construed to require nothing of creditors, as between each other, but equality.

In such cases, equity will enforce equality as against

priorities and preferences, whenever it can, and all statutory insolvent and bankrupt laws detest preferences..

To cases of insolvent corporations, the maxim of equality has always been held to be especially applicable, and there are but few Courts which have held that directors may violate it in securing a preference even for a lawful debt to themselves.

Equity in England substantially abrogated the laws and rules for preferences in insolvent estates of deceased persons, in behalf of equal, pro rata distribution.

As we understand the decision, this Court finds these bonds and the mortgage to be unlawful, and sustains their enforcement against nobody, except in equity. In law they have no standing, even with claims of other creditors, and equity never yet created a preference as between equal, equitable claims, and surely not in behalf of one that was equitable only, and against the rest that were both legal and equitable.

It is still not too late to re-consider the equities. And once more, before seeking to obtain more on petition for *certiorari*, appeal is made to the grace and patience of this Court to hear this appellant on the proposition that this thirty-eighth assignment concedes more than a full measure of all the equity to which the complainant is entitled as against the judgment creditor.

The other side cannot object to the rehearing or delay. They have just learned that they take nothing on the legality of their bonds and mortgage, but everything from the good conscience and equity of the Court. They cannot complain if that Court shall be careful to give to them no more than is required by the same justice and equity on which alone they take anything. Indeed, we adopt the

language of their own brief before this Court when, departing from their complaint and abandoning the ground on which the decree of the lower court sustained the validity of their contract, they said:

> "The Court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the Court on that question."

The interests involved are not only very large in values, but also in their influence upon other properties. If this decision be added to those in Iowa, which hold that creditor directors of insolvent corporations may secure preferences to themselves, there will be but little protection in law or fact for any creditors, but directors, of Iowa companies. And such mischief to credit is incalculable. It is submitted that the case is worthy of all the time and consideration which the Court can possibly afford to it.

Leave is asked to support this petition with a brief, submitted herewith, which the Court is earnestly requested to read.

In the brief, there are a few points briefly considered which still maintain that the complainants' securities are utterly void and unenforceable. They are urged only as further reason why the complainant should be held to do like equity with that which is exacted of the judgment creditor.

All the concessions herein made, and the scope thereof, are limited to the purpose of this petition.

There is no authority or precedent to guide the Court as to what consideration should be given to the offer herein contained; but the science of the law, like every science, makes progress, "creeping on from point to point,"

and if there be any doubt in the mind of the Court as to whether the one herein presented is advancement, it is suggested that such doubt is worthy of certification into the Supreme Court, even if this Court should not grant the rehearing as prayed.

If neither the rehearing nor the certification can be had, then the petitioner would like such order as will afford opportunity for the presentation of the petition for *certiorari*, and to that end would like to have the record show some consideration of the offer in this petition, as *certiorari*, if a petition for it be necessary, will probably be asked for by the judgment creditor alone, and only for the modification of the decree and limited relief herein sought.

Respectfully submitted,

JOHN C. COOMBS,
HENRY J. TAYLOR,
Appellants' Solicitors and Counsel.

322 No 801, Equity.

CERTIFICATE OF COUNSEL.

I, Henry J. Taylor, counsel for appellants, and petitioners for rehearing in the above entitled case, do hereby certify that the above and foregoing petition for rehearing is made in good faith and in the earnest belief that the petition should be granted.

And I further certify that I have carefully examined into the matters set forth in this petition for rehearing and reargument, and that I believe the grounds for said petition, as therein stated, are true and well founded, and are sufficient in point of law, and that said petition is not made for the purpose of vexation or delay.

Sioux City, Iowa, Sept. 29, 1897.

HENRY J. TAYLOR,
Counsel for Appellants and Petitioners.

Postoffice address,
Sioux City, Iowa.

Indorsed: Filed Sep. 29, 1897. John D. Jordan, Clerk.

323 And on the eighteenth day of October, A. D. 1897, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellants for a rehearing in said cause, in the words and figures following:

United States Circuit Court of Appeals. Eighth Circuit.
May Term, 1897.

Monday, October 18, 1897.

The Sioux City Terminal Railroad and Warehouse Company et al., Appellants,
No. 801. vs.
The Trust Company of North America, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This cause came on this day to be heard upon the petition for a rehearing filed by counsel for the appellants and the brief in support thereof.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause be, and the same is hereby denied.

October 18, 1897.

And on the eighteenth day of October, A. D. 1897, a motion for stay of mandate was filed in the clerk's office of said Circuit

Court of Appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals. Eighth Circuit.
December Term, 1896.

Sioux City Terminal Railroad & Warehouse Company et al.,
Appellants,
No. 801. vs. Equity.
Trust Company of North America, Trustee, Appellee.

The appellants herein now state to the Court that in
324 the event of a denial by this Court of this petition for rehearing, it is their intention to apply to the Supreme Court of the United States with reasonable promptness for a writ of certiorari, and therefore said appellants move this Court to make a proper order in the premises staying the mandate from this court to the lower court until said application for certiorari shall have been presented to and determined by the said Supreme Court of the United States.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Solicitors and Counsel for Appellants.

Indorsed: No. 801. Equity. U. S. Circuit Court of Appeals, 8th Circuit. S. C. Terminal R. R. & W. H. Co. et al., plaintiff, vs. Trust Co. of North America, Trustee, defendant. Motion for stay of mandate. Filed Oct. 18, 1897. John D. Jordan, Clerk. John C. Coombs, Henry J. Taylor, Attorneys for Appellants.

And on the eighteenth day of October, A. D. 1897, in the record of the proceedings of said Circuit Court of Appeals is an order staying mandate, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.
May Term, 1897.

Monday, October 18, 1897.

Sioux City Terminal Railroad and Warehouse Company et al.,
Appellants,
No. 801. vs.
Trust Company of North America, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

325 Upon motion of counsel for the appellants it is ordered that the mandate to the Circuit Court in this cause be, and the same is hereby stayed for a period of 30 days from and after this date.

October 18, 1897.

326 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals, Eighth Circuit, do hereby certify that the foregoing 325 pages contain a true copy of the printed record upon which the cause was heard in this court and true and complete copies of the proceedings and record entries, including the opinion of said Circuit Court of Appeals, in the case of The Sioux City Terminal Railroad and Warehouse Company et al., appellants, vs. The Trust Company of North America, appellee, No. 801, May term, 1897, as the same remain on file and of record in my office.

United States Circuit Court of Appeals Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the city of St. Louis, Missouri, this twenty-eighth day of October, A. D. 1897.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

327 United States Circuit Court of Appeals, Eighth Circuit.

THE SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE CO., CREDITS COMMUTATION CO., E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN AND TRUST COMPANY, APPELLANTS,
vs.
THE TRUST COMPANY OF NORTH AMERICA, APPELLEE. } No. 801.

Stipulation.

In order to save unnecessary expense, it is hereby stipulated by and between the appellants and appellee that the certified transcript of the record and proceedings herein, now on file in the Supreme Court of the United States, in the matter of appellants' petition for writ of certiorari, together with printed copies thereof furnished or to be furnished to the clerk of the Supreme Court by appellants, shall be taken as a return to said writ of certiorari, as the certified copy of said record and proceedings in said cause required, and as the printed copy of said record and proceedings required, and in all respects in full compliance with the writ of certiorari issued therein by the Supreme Court of the United States commanding the honorable the judges of the United States circuit court of appeals, eighth circuit, to send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

The clerk of the United States circuit court of appeals may use this stipulation in making his return instead of a further certified copy of the record and proceedings in said cause.

Dated Sioux City, Iowa, December 14th, 1897.

HENRY J. TAYLOR,
Counsel and Solicitor for Appellants.
ASA F. CALL,
Counsel and Solicitor for Appellee.

Endorsed: #801. U. S. circuit court of appeals, eighth circuit. The S. C. Terminal R. R. & Warehouse Co. *et al.*, appellants, *vs.* The Trust Co. of No. America, appellee. Stipulation as to return to writ of certiorari. Filed Dec. 17, 1897. John D. Jordan, clerk.

328 UNITED STATES OF AMERICA, *ss.*:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, trustee, and E. H.

Hubbard, assignee of the Union Loan & Trust Company, are appellants and The Trust Company of North America is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the northern district of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein
329 should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ of Certiorari.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, in obedience to the command of the within writ and in pursuance of the stipulation of the parties, a true copy of the original of which is hereto attached, do hereby certify that the transcript of record furnished with the application for a writ of certiorari to the Supreme Court of the United States in the within-named cause contains a full, true, and complete transcript of the record and all things concerning the same, as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this eighteenth day of December, A. D. 1897.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

330 [Endorsed:] Case No. 16,717. Supreme Court of the United States. No. 504, October term, 1897. The Sioux City Terminal R. R. & Warehouse Co. *et al. vs.* The Trust Company of North America. Writ of certiorari and return. Office Supreme Court U. S. Filed Dec. 20, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,717. U. S. C. C. of appeals, 8th circuit. Term No., 504. The Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard, trustee; E. H. Hubbard, assignee of the Union Loan & Trust Company, petitioners, *vs.* The Trust Company of North America. Filed November 9, 1897.

504

NOV 9 18
JAMES H. McKENN

PETITION FOR CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,

IN THE CASE OF THE

"SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company, *Appellants*,

Petitioners,

vs.

TRUST COMPANY OF NORTH AMERICA, *Appellee*,"

Respondent.

By the said Appellants, Petitioners, who file herewith their certified transcript of record and printed brief, with the requisite copies of each.

JOHN C. COOMBS, 25 Equitable Building, Boston, Mass.,
HENRY J. TAYLOR, Sioux City, Iowa,

Counsel and Solicitors for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,

IN THE CASE OF THE

"SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company, *Appellants*,

Petitioners,

VS.

TRUST COMPANY OF NORTH AMERICA, *Appellee*,"

Respondent.

By the said Appellants, Petitioners, who file herewith their certified transcript of record and printed brief, with the requisite copies of each.

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court of the United States for its review and determination the case of the Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, E. H. Hubbard, Assignee of the Union Loan & Trust Company, Appellants, vs. Trust Company of North America, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of appellants respectfully shows to this Honorable Court as follows:

1. That this petition is brought primarily on behalf of the Credits Commutation Company, judgment creditor, and the other appellants are joined herein mainly, if not wholly, that they may be under jurisdiction to obey and be bound by any order or decree that this Court may see fit to enter in the premises.

2. The Sioux City Terminal Railroad & Warehouse Company, called herein the Terminal Company, is an Iowa corporation, was organized in September, 1889, and purchased grounds for terminal facilities prior to January 1, 1890, and a portion of the same thereafter, and proceeded at or about said date to prepare said grounds for the laying of terminal tracks, and later, in 1892–3, built thereon its union depot.

3. Prior to January 1, 1890, the Terminal Company had executed its notes in the sum of $5,000.00 each, which were deposited with and negotiated by and under the endorsement of the Union Loan & Trust Company, of Sioux City, Iowa, note by note, to different banks and bankers throughout the country, mainly in the Eastern states, and for its endorsement and negotiation the Trust Company received a small commission. The proceeds of these notes purchased the property of said Terminal Company, there being no cash received upon its stock, the entire issue of which, $1,000,000.00 par value, was finally given to the Sioux City & Northern Railroad for the control of a few franchises or rights of way upon certain streets and alleys, having no substantial value, but serving as a form or subterfuge under which to issue the Terminal stock.

4. The aggregate indebtedness represented by these different $5,000.00 notes so negotiated to various and different parties throughout the country was, on January 1, 1890, about $1,250,000.00. This amount was at different times more or less reduced,

but the larger part of it by renewals and substitutions continued in the same form of these six months $5,000.00 notes until at the time of the failure of the said Union Loan & Trust Company, which had negotiated the same under its endorsement and of which Appellant E. H. Hubbard became assignee for the benefit of creditors on the 25th day of April, 1893, there was outstanding of these notes the aggregate sum of $718,000.00. In reference to this note indebtedness, it is stipulated (transcript, pp. 243-4) between the parties to this suit "that there are outstanding, due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company negotiated through the Union Loan & Trust Company under its endorsement to the amount of $718,000.00," and in said stipulation further described as the notes to which reference will constantly be made in this petition, and including as a part thereof the notes purchased and herein represented by the Appellant Credits Commutation Company, which subsequently to 1893 became the owner of $616,000.00 principal of said outstanding notes, and on July 23, 1895, reduced the same to judgment against said Terminal Company for the amount of said principal, $616,000.00, and interest, $75,596.95, on which general execution was at once issued and returned wholly unsatisfied. Whereupon said Credits Commutation Company, judgment creditor, appellant and petitioner herein, intervened by permission of court in this suit which had been commenced in the preceding year, but which had not gone to decree.

This suit is brought by the Trust Company of North America to foreclose an alleged first mortgage executed by the Terminal Company upon all its properties, rights and franchises, dated January 1, 1890, and purporting to secure 1,250 bonds of the amount of $1,000.00 each par value of said Terminal Company, which bonds, to the amount of $1,000,000.00 were negotiated for substantial value in July, 1890, and the remaining $250,000.00 thereof were not sold until the summer of 1893, prior to which later date the identical notes represented herein by Appellant

Credits Commutation Company, judgment creditor, were all actually outstanding.

5. The Terminal Company got the benefit of proceeds of the notes and of the bonds. Indeed, the proceeds of the earlier notes, herein retained by renewals and substitutions, purchased the property covered by the mortgage in controversy.

6. The negotiation of the notes took place in single transactions with separate parties, each note for $5,000.00, and making no disclosure upon its face or otherwise of other notes or other indebtedness, and the validity of this indebtedness of petitioner is admitted by stipulation in the record. (Transcript, pp. 243-4.)

7. Each bond, (Transcript, p. 144) however, referred to the mortgage in controversy and upon its face disclosed the fact that each bond was a part of an indebtedness aggregating $1,250,000, as a single transaction. The mortgage fixes the issue at the same amount. (Transcript, p. 143.)

8. The authorized capital stock of this Terminal Company was only $1,000,000, and the company was permitted (Transcript, p. 190) to commence business when only $200,000 of said capital stock had been subscribed. Only this last amount had been subscribed or issued at the date of the bonds and mortgage.

9. The articles provided (Transcript, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

10. The statute law of Iowa, §1611 of McClain's Code of Iowa, originally read thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

Chapter 22 of the laws of the 20th General Assembly, 1884, added the following proviso:

> "Provided, that the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile, single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

In 1886, Chapter 54 of the laws of the 21st General Assembly, made this further addition or second proviso, to-wit:

> "Provides, further, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of such debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

11. The appellant, Credits Commutation Company, judgment creditor, with the validity of its indebtedness admitted under stipulation in this suit, defends against the foreclosure of said mortgage, and the establishment of the entire indebtedness purporting to be represented by the bonds securing the same, on several grounds, one of which is that the execution of said mortgage and the incurring of said indebtedness are *ultra vires* and unlawful.

THE MORTGAGE TO THE TRUST COMPANY OF NORTH AMERICA AND THE BONDS PURPORTING TO BE THEREBY SECURED ARE ULTRA VIRES AND UNLAWFUL.

12. Said Credits Commutation Company, judgment creditor, contends that said indebtedness violates the provision of

the statutes of Iowa above quoted, which prohibited a corporation from incurring an indebtedness beyond two-thirds of its capital stock. The articles (Transcript, p. 191) says "paid up capital stock," of which there never has been any. The authorized capital stock of the Terminal Company has never been to exceed $1,000,000.00, and therefore the incurring of the single indebtedness represented by the mortgage and bonds in controversy, aggregating $1,250,000.00, was *ultra vires* and unlawful, and is so found by the Circuit Court of Appeals, the full opinion of which is hereto annexed as Exhibit "A," pp. 25–43 hereof.

13. The Circuit Court, on the hearing, in so far as the statements made at the time of the hearing can be used as a criterion, seemed to favor the contention of this judgment creditor, but in the decision of that Court, the mortgage and bonds in controversy were sustained under a construction of the statute of Iowa. The opinion of the Circuit Court is printed in full in the Record, pages 263-272.

14. The Circuit Court of Appeals, for the purpose of its decision, conceded that the bonds and mortgage did not fall within the saving provisions of the statute, and rested its decision upon entirely different grounds from that of the Circuit Court, to wit: Upon the ground that he who seeks equity must do equity, and therefore the mortgage and bonds in controversy could not be assailed while the proceeds were not tendered back by the Terminal Company, and that the Credits Commutation Company, judgment creditor, has no equitable claim to attack the mortgage and bonds superior to that of the Terminal Company itself. This petition for the writ of certiorari is asked on behalf of the Credits Commutation Company, judgment creditor, in the belief that its position in a case determined, as was this by the Circuit Court of Appeals, upon relative equities, is superior to the position of the Terminal Company, and that even if such is not so, still the petitioner's defense should prevail to the extent

that the admittedly valid indebtedness represented by the notes should pro rate with the indebtedness represented by the bonds in the Terminal property, each alike without benefit of security.

15. The indebtedness represented by this judgment creditor as individual notes antedates the sale of 250 of the Terminal bonds, and by substitutions and renewals, reaches back in a continuous line of indebtedness represented by like notes to a date prior to the sale of any of the bonds, or the giving of the mortgage. The indebtedness of this judgment creditor is by stipulation admitted to be a valid indebtedness of the Terminal Company. Even without this admission the validity would still be unquestionable. Each note of $5,000 is a separate and single transaction not disclosing the aggregate indebtedness. In the sale of each note, the Terminal Company, as a matter inherent in each several transaction in law is presumed to represent that it had the authority to create the indebtedness, and each transaction itself amounted to a presumption conclusive against the Terminal Company of that lawful authority and a practical warranty to each noteholder that the statute in reference to indebtedness had not been exceeded nor violated. It may be true that in each transaction the Terminal Company was doing an unlawful thing and was taking the money of each noteholder under the certain, but concealed, inability to pay the same. The guilt of the Terminal Company in the transaction is complete. The innocence of each noteholder is absolute. Moreover, the validity of our indebtedness is admitted, and is therefore not before this Court for determination. The controversy, however, is not limited to the noteholder and the Terminal Company, but is tripartite, involving the Trust Company of North America in its assertion of its mortgage and bonds thereby secured. It may be admitted that as between these bondholders and the Terminal Company, the equities are in favor of the bondholders and against the Terminal Company. The guilt of the Terminal Company in that transaction as in our transaction may be admitted, but it

cannot in that transaction be stated that the bondholders are innocent. Each bond disclosed upon its face to its owner that it is a part of an indebtedness that violates the statute law of Iowa, that said indebtedness is created, and that every bond is issued against the prohibition of said statute. The indebtedness is unlawful, and while the equities relatively may measure higher in behalf of the bondholders than in behalf of the Terminal Company, it still remains that the bondholders deliberately, designedly, intentionally, entered into a transaction that not merely disregards but violates the plain provisions of the laws of the State of Iowa, as well as the articles of incorporation of the Terminal Company. This is not a case where by piece-meal an indebtedness within the knowledge of the Terminal Company, but without the knowledge of its creditors, creeps beyond the statutory limitation. It is not a case where even with extrinsic knowledge an indebtedness is created and incurred which, in and of itself, is within the limitation. This is not a case where the bondholders could sue upon their bonds, and in the presentation of them to the Court to sustain their case, would not disclose violated law. Distinctions are sometimes made on the basis of being able to sustain an action without, on the face of the instrument, disclosing violated law, and on this state of facts recoveries have been had, even where by extrinsic evidence the violation of law might have been shown, but the showing of such violation did not inhere into the *prima facie* basis of recovery. No recovery, however, is possible upon these bonds or mortgage, either or both, in a court of equity or in a court of law, that does not, in the making of the *prima facie* case, disclose to the Court that they rest upon and represent a transaction that offends against the plain prohibitions of the laws of Iowa, and the articles of association. The question of violated law as to these bonds is a question of simple arithmetic. Two-thirds of $1,000,000= $666,666. That refers to authorized, not actually issued, stock.

Board of Com. v. Potter, 142 U. S., 355.

It yet remains to be declared in Iowa or elsewhere that a single transaction of itself so large as to violate law will be sustained on the contracts, even against the company that has received and retained the benefits and proceeds thereof, and certainly not where sustaining the mortgage gives to the unlawful transaction a priority over *bona fide* debts and thus takes everything. As against *bona fide* debts, the unlawful should not in equity be affirmatively given the full fruits of lawful transactions.

16. We do not ask the Court to determine necessarily what would be its declaration of law or equity as between the bondholders and the Terminal Company. The controversy presented is limited to a declaratien of equities between the bondholders and this judgment creditor, and the question is further presented to the Court for a declaration of these equities under an offer of this judgment creditor made in the Circuit Court, and made again in the Circuit Court of Appeals, and now repeated in this Court, to-wit: The bonds to *pro rate* with the indebtedness represented by the Credits Commutation Company, appellant herein, and neither party to receive any benefit from the security other than the *pro rata* distribution of the proceeds of the sale of the Terminal property. It was in essence an offer by this creditor to waive all liens, titles and priorities in his own behalf if the mortgage should be found to be unlawful, provided the Court would impose like waiver on the mortgagee as a condition to any enforcement of its unlawful claim, and to the end that all creditors of the insolvent Terminal Company might thus share equally and *pro rata* in its assets.

THE OFFER OF THE PETITIONER IS AN OFFER TO DO EQUITY.

17. It is anticipated that every Court of Equity should have an initial impulse to uphold these bonds, or to afford a relief equivalent to the mortgage as against the mortgagor. Every Court wants to do so simply.

Such a desire is a native vigor of equity and could be met in only two ways: first, by imposing insuperable legal bars; or, second, by yielding to the equity until its just requirements should be satisfied.

But the bonds, too, were in such counter plight that resort could be had to but two devices in their behalf:

First: To force a construction of the exception in the proviso of McClain's Code, ss. ~~1610~~, 1611, *supra*, and rule that that exception includes and validates the bonds. This would avoid all legal obstruction and render consideration of the equities unnecessary and impertinent.

The Circuit Court took the dilemma on that horn, and tried to so hold, but whether its opinion did this successfully, or was itself impaled, the Circuit Court of Appeals expressly leaves undetermined, but is willing to concede the latter.

Second: To deny the validity of the bonds, but to enforce their obligations because "good faith, justice and equity demand it," and on the maxim that "he who seeks equity must do equity." That was the course adopted by the Circuit Court of Appeals.

18. Again, there are two appellants, but both practically defendants, both represented by the same counsel, but having different purposes which various interests require to be preserved. They are the Terminal Company and the judgment creditor, the latter standing, formerly, on the conveyance made to Hubbard for its benefit, and now, also, on its judgment and the lien thereof.

It was for the interest of the defendant company to deny all indebtedness and liens, and to retain its property free from all obligations.

The judgment creditor can only have the payment of his debt. He has no interest in the obligations of the bonds, or in any question of their validity. He is interested in the question of the validity and priority of the mortgage, but only in so far as

it encroaches upon the assets or the lien of his judgment. He simply objects to the enforcement of the mortgage against his own interests.

In the foregoing situation—comprehending either of the two decrees which the bondholders might attempt to obtain—one to sustain the validity of the bonds, or another for relief in equity equivalent to the mortgage, and the two expedients which might be tried to meet these attempts, and the different purposes of the two parties or defendants who had any interest to oppose the bonds or mortgage—the case went to trial, and the Circuit Court sustained the validity of the bonds as within the exception in the proviso in the Code, ss. ~~1610~~, 1611, *supra*. (Transcript, pp. 265-8.)

19. The construction of the Circuit Court does violence to the language and purpose of the statute. Nothing can be found therein which lends plausibility to such a construction or that such a theory as to the effect of the whole section was contemplated by the law-making power. It was not intended that the proviso should generally extend the limit of indebtedness that Iowa corporations may incur, but that it simply excepts a specific class of indebtedness from the application of the theretofore generally limiting statute. The construction of the Circuit Court is extremely perilous to the interests of those dealing with corporations as well as dangerous to public policy. If it correctly declares the law, the bar of the statute is thrown down, and there is practically no limit left upon the indebtedness which a railroad or land corporation in Iowa may incur except the conscience of the corporate officers.

The bonds of the Terminal Company in controversy secured by mortgage to the Trust Company of North America upon its properties, do not come under and are not saved by the provisions of this second proviso. It is a matter of common knowledge that this provision was secured in 1886 by corporations in

Iowa doing a farm mortgage loaning business. The capital of these corporations derived from their stock was not used to purchase real estate, but was loaned out upon farms in usually small and varied amounts. The purpose of the law was to permit loan companies to deposit with a trustee large numbers of these farm mortgages, which consisted of ordinary notes secured by ordinary farm mortgages, and to issue debentures or bonds, commonly called "debenture bonds," which bonds were secured by these farm mortgage real estate securities in the hands of the trustee and such debentures or bonds, properly identified and certified by the trustee, were by the corporation sold and the money derived therefrom used to further prosecute the loaning business. Such loaning company usually made its farm loans on the basis of one-third and not to exceed one-half of the value of the real estate or farm. And so back of all these farm mortgages, there rested real estate of at least twice the value of the securities. Under this law these loaning companies were authorized by issuing their debentures or bonds to become indebted in excess of two-thirds of their paid up capital stock, and even to the full extent of their assets if the proceeds of their stock should be all used in making these farm or real estate loans.

The language of the second proviso is that the company may issue its debentures or bonds, "the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of the purchasers of said debentures or bonds." The act does not say nor mean debentures or bonds secured by mortgage upon its own real estate. This was not its purpose. The "real estate securities" contemplated by the act were securities owned by the company, but not upon real estate owned by the company. The debentures or bonds provided for are not ordinary terminal or railway bonds secured by the property of a railway or terminal company in mortgage or trust deed form, but refer to a term then and now in common use, to-wit, debentures or bonds secured not by mortgage upon the maker's

own real estate, but secured by real estate securities, a term also to be given its ordinary and accepted meaning, and these real estate securities are to be actually transferred, presumably to some trustee or person acting in like capacity, for the protection of the purchasers of these debentures or bonds. These securities, not the real estate security, must also be at least equal in amount to the par value of such bonds or debentures, which implies that these bonds or debentures are protected or secured, not by real estate security in the form of a mortgage upon real estate of the corporation, but by real estate securities owned by the corporation and capable of actual transfer, to-wit, notes and bonds, secured by real estate mortgages. Real estate securities in this act mean evidences of indebtedness secured upon real estate and include not only the real estate mortgage, but the note evidencing the indebtedness so secured by mortgage or other lien, and such securities are further to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon. To say that "such securities (are) to be at least equal in amount to the par value of such bonds or debentures" shows that the act refers to securities rather than to corporate real estate. The word "amount" means and refers to the aggregate total or sum of securities and not to the value of corporate real estate. The word "worth" in the next line refers to the worth not of real estate of the corporation, but of third parties on which the securities owned by the corporation are first liens. The "actual transfer" of these securities is not a mortgage but a delivery to a trustee who holds merely the real estate securities and not real estate security. The loans upon the real estate are complete before the bonds or debentures are issued, and these consummated loans are the "securities." In other words, there exists originally the evidence of indebtedness and the instrument securing it upon real estate, and these are complete in themselves and both are necessary in order to make up real estate securities. The bonds or debentures are instruments afterwards executed,

are wholly separate, are not liens upon real estate, and are not the instruments or evidences of debt secured directly by the mortgage, but only indirectly by these collateral real estate securities held in trust. If one were to examine such real estate security as the act contemplates, to ascertain the debt that it secures, he would never be referred on the face of the instrument to the bonds or debentures permitted to be issued under this provision by the corporation. Such security would be absolutely silent as to any debentures. The debentures would refer to the securities, but not the securities to the debentures. All the real estate securities, both in the form of the notes and the mortgages going with them, could be read through and through and there would be no intimation or information as to the proposed bonds or debentures provided for in this second proviso. If the act intended that debentures were to be secured by an actual transfer of real estate, then the legislature would have omitted the word "securities."

It is difficult to argue a question of construction. The Circuit Court, in its attempt at construction, acknowledged the difficulty, and we think reached an illogical and unwarranted conclusion. He states, page 265, that by the second proviso it is declared that this two-thirds limitation shall not apply to debentures or bonds secured by a first lien upon unincumbered real estate worth at least twice the amount loaned thereon. The language of the proviso is not consistent with this statement, for the proviso is that these debentures or bonds are to be secured, not by a first lien upon unincumbered real estate directly, but by real estate securities, which securities are to be first liens upon real estate worth at least in each instance twice the amount loaned thereon. These real estate securities represent completed and consummated loans already made and owned by the corporation in the form of the ordinary note and mortgage or real estate security. The loans which constitute the securities must be made before the bonds or debentures can be

issued, and while indirectly the latter may be secured upon real estate, they are directly to be secured by "real estate securities." Of course these bonds and debentures are for the purpose of raising money, but they are not the original loans evidenced by the real estate securities referred to in the act. The Circuit Court says, page 265:

> "The theory of this section seems to be that if bonds of the corporation are secured upon real estate worth at least twice the amount loaned thereon, they will be paid out of this security and thus there will be left for the benefit of other creditors the security derived from the capital stock of the corporation."

We do not think that anything like this was in the contemplation of the law-making power. The only rational theory of the section is that the second proviso was added to enable loan companies to use the securities derived from loans made with the proceeds of the capital stock of the corporation as collateral to its debentures; that is, to use the proceeds of the capital stock of the corporation in whole or in part, in making ordinary real estate loans, which loans constitute these "real estate securities." The law was not intended to reach such corporations as invested the proceeds of their capital stock in real estate owned by themselves, but in loans secured upon other real estate.

The Circuit Court says that the trust deed to the Trust Company of North America is a real estate security (page 266) and that the execution and delivery thereof to the trustee was an actual transfer of real estate security for the benefit of the purchasers of the bonds described in it, and consequently that these are within the provision of the act, but we do not so understand the language of the act. It is true that the trust deed to the Trust Company of North America secured this $1,250,000.00 of bonds, and that the trust deed is real estate security, but it does not satisfy nor come under the plain provisions of the act. These Ter-

minal bonds and trust deed are the original evidences of the loan, but the real estate securities referred to in the act are evidences of loans previously made and completed.

Cook on Stockholders in volume 2, section 777, third edition, says:

> "In the United States the 'debenture' is new and has no clearly defined place among the securities of corporations. A so-called debenture, however, is rapidly coming into use in this country. Its character and issue are as follows: Certain corporate assets, generally railroad bonds or stock, or real estate mortgages or municipal bonds, or water-works bonds, are deposited with trustees to secure the debenture holders. The debenture itself is a bond or note of the corporation, reciting on the face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of security has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering bonds or stock as collateral security."

The first proviso covers the subject of railways, and it may be presumed that the second proviso had reference to other corporations or subjects.

Se we contend for this act that it refers, not to these Terminal bonds secured by trust deed or mortgage upon the Terminal real estate, but to other bonds or debentures that would or might be secured by pledge of securities as collateral. The statement of Cook gives the common acceptance and understanding of the language of the Iowa Code, and the construction of the Circuit Court is erroneous and violates the intention of the legislature and the common and accepted meaning and understanding of the words of the statute. This being so the "two-thirds limitation" of the

statute applies to the Terminal bonded indebtedness, and this limitation might be decreased but cannot be increased by any provisions of the charter of the corporation.

THE OFFER AND THE THIRTY-EIGHTH ASSIGNMENT OF ERROR.

20. The offer made in behalf of the judgment creditor was printed in the appellants' brief in the Circuit Court, as follows:

> "Should this mortgage be declared to be void and the conveyance to Hubbard allowed full priority to the exclusion of the bondholders, at least that great principle of justice founded upon equality, which equity first and always promulgated to govern insolvencies, would not be satisfied.
>
> A court of equity has always the right to refuse to go on when its action in behalf of either party must necessarily do some wrong to the other. And it is for this reason that such courts have uniformly suggested compromises when the occasion called for them.
>
> To that end, therefore, while praying that this mortgage may be declared null and void, we are willing to take a decree to that effect, conditioned upon the waiver or a declaration of nullity of the deed to Hubbard, so that all creditors of this Company shall share *pro rata* in the assets."

The offer was made without waiting to take the chances of getting more, and covered two-thirds of the entire interest at stake; and when made by an innocent creditor, standing to defend a valid and solid judgment of a court of law, to the conscious taker of an unlawful mortgage who can ask no legal but only equitable relief, the offer, it is submitted, deserves such consideration as should entitle the maker to be heard upon it, and to learn if it does not satisfy the requirement of the innate equities in behalf of the bondholders as against such creditor.

What is equity as between these two in this case is an open question.

The offer was persisted in, even after the Circuit Court had rejected the grounds upon which the Circuit Court of Appeals bases its decree, and had been able to find for the complainant only upon a construction of the statutes which was palpably erroneous.

21. The thirty-eighth assignment of error was based upon the offer, and is as follows:

> "38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, to share at least *pro rata* with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Railroad & Warehouse Company properties."

This error was also reflected in other assignments, and in appellants' brief before Circuit Court of Appeals these assignments were condensed into what is therein designated assignment of error number 15. Said condensed assignment number 15 of appellants' brief is as follows:

> "15. The Circuit Court erred in not permitting E. H. Hubbard, assignee and trustee, and especially the Credits Commutation Company, to share, if not in priority, then *pro rata* at least, with the Trust Company of North America in the proceeds of the sale of the Terminal Company property."

22. Following this up at the hearing before said Court of Appeals, the senior counsel for the appellants orally renewed the offer on which the assignment rested.

It was made to meet this difficulty: The appellants deemed it impossible for the Court to invoke the maxim that "he who seeks equity must do equity," as against the defendant, or judgment creditor, for the seemingly conclusive reason that neither of the appellants was seeking equity or anything else from the

Court. The defendant filed no cross bill, and the creditor could not intervene for any purpose but the protection of his own interest. Besides, his interest was legal and not equitable. Both appellants even fought the jurisdiction from beginning to end. The maxim could not apply. For these reasons the creditor appellant thought that the equity must be tendered by him, and could not be exacted as a condition.

It was conceived that the rule that equity could ask nothing of a defendant might work an injustice. It is not true that a defendant can have affirmative relief in equity only by cross bill. It was clear in this case that the defendant would get affirmative and equitable relief by a purely negative answer if sustained.

So of the judgment creditor. If he were admitted simply to contest the complainant's mortgage, and were successful, the result would be that, though standing apparently upon the defensive, or asking only for the dismissal of the bill, he would be let into a prior lien and would get everything, and the bondholders nothing.

It is true that the judgment creditors did not know that their claims added to others, were, in the aggregate, excessive, and the bondholders did know that their own claim was so in itself, which, in conscience, supports the result that, in claims attacked for excessiveness, the more excessive may indeed be the more valid.

23. Nevertheless, the judgment creditor thought that to have the law sustained he should eliminate inequitable results, for, after all, the contention between him and the bondholders was, as it stood, one for strict priorities, which are always distasteful to courts of equity, especially in cases of insolvency. It was not an offer whose generosity was inspired by fear on the part of the offerer that he was not entitled to anything, and so should ask for but little; it arose from the fear that, though entitled to all at law, he would not get anything unless he conceded much to

equity — all that was asked of him. It was premised upon the unlawfulness of the bonds which the Circuit Court of Appeals has now found.

The offer is very large in amount. If the property was worth $1,250,000 — and nobody thought less — the offer was worth at least $800,000. This Court will truthfully surmise that the conscience of the defendant company (in whose behalf the law seemed to be a bar) was considerably racked in behalf of the judgment creditor (in the minds of their common counsel) before any such concession could be made. Is it enough?

Assuming that the case is governed by the maxim that "he who seeks equity must do equity," what does that require of the parties?

24. As between the judgment creditor and the bondholder, neither of whom knew that the other existed, good faith, justice and equity require nothing except for this:

The bondholders might have expected that there would be such creditors, but the creditors had statutory assurance that there could be no such bondholders without a violation of law such as the Court has found. The Court has also found that the bondholders were conscious of the violation, for the face of every bond disclosed and proclaimed it, and equity will keep in mind that it is the enforcement of the violation, the very excess between what would have been valid and what is invalid, that leaves the creditor hopeless, utterly.

If it be conceded that the parties are equally honest, yet when one of two such must suffer from the violation of law by either, it ought not to be hard to determine which.

The judgment creditor was more cruelly deceived by false representations of security than were the bondholders, if it can be pretended that the latter were deceived at all, when they knew that they did not have any that was lawful.

The bonds and the notes are equally renewals of extensions of earlier notes, given, in fact, in most instances, to the same holders.

The money of both went, alike and indiscriminately, into the property, and, without the contributions of each, it would not be sufficient to pay either, and is not enough to pay both.

In such cases, and in insolvency also, the ultimate rule for the determination of claims that may compete is that they are respectively entitled to such "proportion of the fund as they or those they represent may be supposed to have contributed to it."

Millers' River National Bank vs. Jefferson, 138 Mass., 112.

The contributors are the distributees.

This is a case of insolvency, and it is exactly in such cases that the maxim that "he who seeks equity must do equity," is construed to require nothing of creditors, as between each other, but equality.

In such cases equity will enforce equality as against priorities and preferences, whenever it can, and all statutory insolvent and bankrupt laws detest preferences.

To cases of insolvent corporations, the maxim of equality has always been held to be especially applicable, and there are but few Courts that have held that directors may violate it in securing a preference even for a lawful debt to themselves.

Equity in England substantially abrogated the laws and rules for preferences in insolvent estates of deceased persons, in behalf of equal, *pro rata* distribution.

25. As we understand the decision, the Circuit Court of Appeals finds these bonds and the mortgage to be unlawful, and sustains their enforcement against nobody, except in equity. In law they have no standing, even with claims of other creditors,

and equity never yet created a preference as between equal, equitable claims, and surely not in behalf of one that was equitable only, and against the rest that were both legal and equitable.

The bondholders take nothing on the legality of their bonds and mortgage, but everything from the good conscience and equity of the Court. They cannot complain if the Court shall be careful to give to them no more than is required by the same justice and equity on which alone they take anything. Indeed, we adopt the language of their own brief before the Court of Appeals when, departing from their complaint and abandoning the ground on which the decree of the lower Court sustained the validity of their contract, they said:

> "The Court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the Court on that question."

The interests involved are not only very large in value, but also in their influence upon other properties. If this decision be added to those in Iowa, which hold that creditor directors of insolvent corporations may secure preferences to themselves, there will be but little protection in law or fact for any creditors, but directors, of Iowa companies. And such mischief to credit is incalculable. It is submitted that the case is worthy of all the time and consideration which the Court can possibly afford to it.

THE TERMINAL COMPANY HAD NO AUTHORITY TO MORTGAGE ITS PROPERTY.

26. The Terminal Company is a quasi public corporation organized under chapter 139 of the acts of the 20th General Assembly of Iowa and has no authority to mortgage its property. We understand that in the case of quasi public corporations, leases and mortgages that alike disable the corporation from per-

forming its duties to the public and the state are *ultra vires* and void as against public policy, unless there is express consent of the sovereign to the making of the lease or the mortgage. This mortgage, covering all property, rights and franchises of every form, nature and description possessed by the Terminal Company, cannot be said to be any aid or incident to the purposes of the company, in that it could lead only to self-destruction, and therefore the law of *ultra vires* applicable to leases applies in its reason and authority to this mortgage. The argument of this will appear in the accompanying brief.

The petitioners have filed in support of this petition for certiorari under separate cover, their brief, to which the attention of the court is earnestly directed.

Respectfully submitted,

JOHN C. COOMBS,
25 Equitable Building,
Boston, Mass.,
HENRY J. TAYLOR,
Sioux City, Iowa,
Of Counsel for Petitioners.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Petitioners' Solicitors and Counsel.

STATE OF IOWA, }
WOODBURY COUNTY, } ss.

Henry J. Taylor, being first duly sworn, says that he is one of the attorneys and of counsel for the above named petitioners, and as such, in conjunction with Mr. John C. Coombs, had personal charge for said petitioners of the case in the foregoing petition mentioned in the Circuit Court of the United States, for the Northern District of Iowa, Western Division, and in the

United States Circuit Court of Appeals for the Eighth Circuit; that he has read the foregoing petition for Writ of Certiorari by him subscribed, and that the facts therein stated are true to the best of his information and belief.

HENRY J. TAYLOR.

Subscribed in my presence and sworn to before me by the said Henry J. Taylor, this 4th day of November, A. D. 1897.

E. A. BURGESS,

{SEAL}

Notary Public within and for Woodbury County, State of Iowa.

EXHIBIT "A."

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

No. 801.— MAY TERM, A. D. 1897.

The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard, Assignee of the Union Loan and Trust Company, Appellants, vs. The Trust Company of North America, Appellee.	Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Mr. John C. Coombs and Mr. Henry J. Taylor for Appellants.
Mr. Asa F. Call for Appellee.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

The case is stated in the opinion.

SANBORN, J., delivered the opinion of the Court.

This is an appeal by the mortgagor and subsequent lienholders from a decree of foreclosure of a first mortgage for $1,250,000 upon the property of the Sioux City Terminal Railroad and Warehouse Company of Sioux City, Iowa, hereafter called the Terminal Company. The appellants challenge this decree on many grounds.

1. At the threshold of the investigation, they meet the complainant with the charge that the court below had no jurisdiction of the case, because some of the defendants were citizens of the same state as the complainant. The complainant was the Trust Company of North America of Philadelphia, Pennsylvania, hereafter called the Trust Company, and it was a corporation of the State of Pennsylvania. It was the trustee for the bondholders secured by the first mortgage made by the Terminal Company, and it brought this suit to foreclose that mortgage on April 17, 1894. The Terminal Company was a corporation of the State of Iowa. The Trust Company made the Terminal Company and a large number of individuals and corporations parties defendant. Among the latter were several banks which had liens upon the mortgaged property subsequent to that of the first mortgage, and which were corporations of the State of Pennsylvania. On June 19, 1894, the Terminal Company and several other defendants demurred to the bill on the ground that the Circuit Court had no jurisdiction because the Pennsylvania banks were corporations of the same state as the complainant. On the next day, the complainant, by leave of the Court, dismissed its suit as to the Pennsylvania banks, and the Court on the same day overruled the demurrers, and consolidated with this suit another which had been previously brought in that court to foreclose a second mortgage upon the property of the Terminal Company. One of the defendants in the latter suit was a citizen of the same state as one of the complainants therein. On June 24, 1895, the Pennsylvania banks presented a petition in this suit in which they alleged that they had judgment liens upon the property and asked that they be admitted to the consolidated suit as parties defendant. Their request was granted and the suit then went to decree.

The general rule in chancery is that all those whose presence is necessary to a determination of the entire controvery must be, and all those who have no interest in the litigation between the immediate parties but who have an interest in the subject-matter of the litigation which may be conveniently settled therein, may be made parties to it. The former are termed the necessary, and the latter the proper, parties to the suit. The limitation of the jurisdiction of the Federal Courts by the citizenship of the parties

and the inability of those courts to bring in parties beyond their jurisdiction by publication, has resulted in a modification of this rule and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controvery that a final decree between the parties before the Court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter, which is separable from the interest of the parties before the Court so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court or the suit will be dismissed. The complainant may join every proper party and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the Court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the Court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the Court as to the parties before it, the suit may proceed without him and the decree will not affect his interests. Revised Statutes, Secs. 737, 738; Equity Rule 47; *Chadbourne's Executors* v. *Coe*, 10 U. S. App. 78, 83, 2 C. C. A. 327, 51 Fed. Rep. 479, 480, 481; *Shields* v. *Barrow*, 17 How. 130, 139; *Ribon* v. *Railroad Companies*, 16 Wall. 446, 450; *Coiron* v. *Millaudon*, 19 How. 113; *Williams* v. *Bankhead*, 19 Wall. 563; *Kendig* v. *Dean*, 97 U. S. 423; *Alexander* v. *Horner*, 1 McCrary 634; *The Cole Silver Mining Co.* v. *The Virginia and Gold Hill Water Co.*, 1 Sawyer, 685. The Pennsylvania banks held judgment liens upon the mortgaged property later in date than, and inferior in equity to, the lien of the Trust Company's mortgage. They were not indispensable parties to the suit, because their interests were separable from those of the other parties to it, and a final decree which would do complete justice between them might be rendered without immediately affecting the interests of these banks. A decree of foreclosure in a suit to which they were not parties would have

left their liens upon the equity of redemption unforeclosed and unaffected. Moreover, their joinder would oust the jurisdiction of the Court as to the other parties to the suit, because they were corporations of the same state as the complainant. When this suit was commenced, therefore, the Trust Company had the option to join or to fail to join these banks as parties defendant, and the Court had the right to proceed without making them parties, under the decisions which we have cited and under the 47th equity rule, which embodies these decisions and reads:

"In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

If the complainant had not joined these banks, the jurisdiction of the court would have been impregnable. Was it destroyed because the Trust Company made them parties defendant, and then with the leave of the court dismissed them from the suit? In *Cameron* v. *McRoberts*, 3 Wheat. 590, McRoberts, a citizen of Kentucky, brought a suit in equity in the District Court of the United States for the district of Kentucky, which then had the jurisdiction of a circuit court, and obtained a final decree. There were three defendants to this suit, one of whom, Cameron, was stated in the bill to be a citizen of the State of Virginia, but the citizenship of the others did not appear. A motion to set aside the decree was made on the ground that the court had no jurisdiction because the two defendants whose citizenship was not stated were in fact citizens of Kentucky. Two of the questions certified to the Supreme Court were: "Had the district court jurisdiction of the cause as to the defendant Cameron and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone?" The answer was: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested)

could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." Courts do not require the performance of idle ceremonies. The Trust Company might have prevented this objection to the jurisdiction of the court by neglecting to join the Pennsylvania banks as defendants. The circuit court could have removed it by permitting the complainant to dismiss this suit and to commence another against all the defendants except the Pennsylvania banks. No reason occurs to us why it might not have obviated it by permitting the complainant to dismiss the banks from this suit. Our conclusion is that the complainant in an equity suit in the Federal courts is not required to join any but indispensable parties to the suit when their joinder will oust the jurisdiction of the court, and if he does join them the court may permit their dismissal, and thereupon it has the same jurisdiction and power to proceed to a decree in the case that it would have had if they had never been made parties to it.

Nor could the subsequent introduction of these banks and other parties into this suit for the purpose of protecting their own interests affect the jurisdiction of the court. When the banks had been dismissed the circuit court had jurisdiction of the subject matter and of the parties to the suit. It also had the possession of the mortgaged property, which was then in the hands of its receiver. A suit which had been previously commenced in the same court was consolidated with this suit, and the Pennsylvania banks, on their own petition, were permitted to be made parties defendant to protect their own interests, but all these proceedings were ancillary and subordinate to this suit to foreclose the first mortgage, and all the parties thus brought into this suit were, in effect, interveners for their own benefit. It was immaterial that some of them were citizens of the same state as the complainant. Consolidations and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought into it may be. *Phelps* v. *Oaks*, 117 U. S. 236, 240; *Stewart* v. *Dunham*, 115 U. S. 61, 64; *Hardenbergh* v. *Ray*, 151 U. S. 112, 118; *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276, 286; *Central Trust Co.* v. *Bridges*, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. Rep. 753; *Society of Shakers* v. *Watson* 37 U. S. App. 141, 155, 15 C.

C. A. 632, 638, 68 Fed. Rep. 730, 736. The objection to the jurisdiction of the circuit court cannot be sustained.

2. The mortgage on which this suit is based covers the franchises and all the property of the mortgagor. The appellants insist that the Terminal Company was a *quasi* public corporation and that it had no authority to make this mortgage, and they specially urge that it was without power to mortgage its franchises and after-acquired property. The Terminal Company is the creature of the State of Iowa. It was incorporated under the general laws of that state. It has the powers granted to it by those laws, together with those fairly incidental thereto, and it has no others. The Omaha Bridge Cases, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, 51 Fed. Rep. 309, 316. The statutes of Iowa then measure the powers of this corporation, and the construction of those statutes by the Supreme Court of that state and its determination of the extent of the powers and liabilities of corporations formed under them is authoritative in this Court. When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the National Courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. *Madden* v. *County of Lancaster*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, 65 Fed. Rep. 188, 192; *Dempsey* v. *Township of Oswego*, 4 U. S. App. 416, 2 C. C. A. 110, 51 Fed. Rep. 97; *Rugan* v. *Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; *Travelers' Ins. Co.* v. *Township of Oswego*, 19 U. S. App. 321, 330, 7 C. C. A. 669, 673, 59 Fed. Rep. 58, 61; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *Detroit* v. *Osborne*, 135 U. S. 492, 499. We turn then to the statutes and decisions of Iowa to learn whether this corporation was endowed with power to make this mortgage. When the Terminal Company was organized the statutes of Iowa provided that any number of people might become incorporated for the transaction of any lawful business, including the construction, ownership, operation and maintenance of railways, bridges or other works of internal improvement, that a corporation so formed should have the power to make contracts, acquire and transfer property, and should possess the

same power in such respects as private individuals enjoy, but should have no power not possessed by natural persons, except those expressly granted to it by those statutes (McClain's Annotated Code of Iowa, §§ 1608, 1609 Subdiv. 6); that before commencing business the incorporators should adopt articles of association and publish a notice, which should state, among other things, the general nature of the business to be transacted (McClain's Code, §§ 1610, 1611); that any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway should have power to issue its bonds for the construction and equipment of its railway and to secure their payment by executing mortgages or deeds of trust on the whole or any part of its property and franchises, and that such mortgages or deeds of trust might cover property acquired subsequent to their dates (McClain's Code, §§ 1955, 1965, 1966); that any number of persons or of railroad corporations, or of persons and railroad corporations, might form themselves into a body corporate, under the foregoing provisions of the statutes, for the purpose of constructing and maintaining union depots for freight and passengers, and that such a corporation should have the power to acquire by purchase or condemnation such real estate as the Railroad Commission should deem necessary for their depot and its approaches. (McClain's Code, §§ 2090, 2091.) According to the notice given by the publication of its articles of association under these statutes, the general nature of the business and the powers of the Terminal Company were "to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side tracks, depot yards, warehouses, storeage houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, * * * * and to mortgage, lease or sell the said grounds and improvements thereon." Under this state of facts, the argument of the appellants is, that this mortgage was *ultra vires* the corporation, because the Terminal Company was a quasi public corporation and had no implied power to mortgage its property, because the power to mortgage its franchises and after-acquired property was not claimed in its articles of incorporation, and because it was

organized under sections 2090 and 2091, *supra*, relating to corporations to construct union depots, and these sections give such corporations no power to mortgage their property. But this was not a corporation organized for the sole purpose of constructing union depots. On the other hand, the description of the general nature of its business in its articles of incorporation makes no reference to any union depot and expressly states that its business is, among other things, to construct and operate one or more lines of railway. Conceding, but not deciding, that a quasi public corporation has no implied authority to mortgage its property, such a corporation has express authority to do so under the laws of Iowa which we have cited (McClain's Code, §§ 1608, 1609), and that power is not restricted or lost by a failure to claim it in the articles of association. The statutes of Iowa do not require the powers of a corporation organized under them to be enumerated in its articles, and an omission to claim any of these powers would not leave the corporation so organized powerless. Thus in *Thompson* v. *Lambert*, 44 Ia. 239, 243, the incorporators limited the objects of a county agricultural society to "the improvement of agriculture, horticulture, mechanic arts, rural and domestic economy." In answer to the contention that the society had no authority to mortgage its property because that power was not enumerated in its articles, the Supreme Court of Iowa said:

"The power to borrow money, execute notes and mortgages was neither assumed nor prohibited. In the absence of any such prohibitory provision the power to borrow money, execute notes and mortgages, as evidences of and security for indebtedness created for the necessary and proper purpose of carrying out the objects of the corporation impliedly exists. For the purpose of effecting the objects of the corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited."

All doubt of the power of the Terminal Company to make this mortgage is, however, dispelled by the provisions of sections 1955, 1965 and 1966 of McClain's Annotated Code. They expressly authorize any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway to mortgage its franchises and all its property, whether acquired

before or after the execution of the mortgage. The Terminal Company was certainly organized to construct and operate a railway, whatever other objects its corporators had in view, and under these provisions, it had express authority to make the mortgage in suit. *Railroad Co.* v. *Howard*, 7 Wall, 392, 412.

3. Another position of counsel for the appellants is, that this mortgage is void, because it violates the rule against perpetuities, which in Iowa is embodied in this provision of its statutes:

"Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter." McClain Annotated Code of Iowa, 1888, § 3091. The argument in support of this position is founded upon this state of facts: On December 14, 1889, the Terminal Company leased to the Sioux City & Northern Railroad Company of Sioux City, Iowa, all its franchises and property for the term of 100 years for an annual rental of $90,000. The lease recited that the Terminal Company had been authorized by its stockholders and by its board of directors to make a first mortgage on its franchises and property to the Trust Company to secure the repayment of an amount not exceeding $1,250,000, and that it was about to do so. It contained a permit to the railroad company to sublet the premises and covenants by the railroad company that it would pay $75,000 and as much more of its annual rental as should be necessary to pay the expenses of the trusteeship to the Trust Company, to be applied to the payment of the interest on the mortgage bonds and to the payment of the expenses of the trusteeship. It also provided that if the lessee failed to pay the rent, the lessor might re-enter and take all the rights and remedies of the lessee against the sub-lessees, and that if default should be made in the payment of the interest on the mortgage bonds, all those rights and remedies should inure to the benefit of the Trust Company or of the purchasers under the mortgage. On January 1, 1890, the Terminal Company made to the Trust Company the mortgage in suit, under the form of a trust deed, to secure the payment of bonds due in ten years to an amount not exceeding in the aggregate $1,250,000. This mortgage recited the lease to the railroad company and its provisions for the benefit of the Trust Company and the bondholders. By its

terms, the Terminal Company transferred and conveyed to the Trust Company all its franchises and property, including all its rights and privileges under the lease to the railroad company. The third article of the mortgage provided that the Terminal Company transferred to, and vested in the Trust Company all the powers, rights and remedies which it had for the collection annually of the $75,000 and the expenses of the trusteeship, which the railroad company had promised to pay to the trustee by its covenants in the lease, that in case of a default of the Terminal Company in the payment of the bonds or the coupons, it would assign to the Trust Company its lease to the railroad company and the rentals due thereunder, and that the Trust Company and the purchaser under the mortgage should be entitled to all the rentals from the sub-lessees. The sixth article of the mortgage gave to the Trust Company the option in case of default to take possession of the mortgaged property, to operate it and collect the income, rents and profits from it, until the principal and interest of the bonds were paid or until the property was sold. The seventh article declared that the provisions of the preceding article were cumulative to the ordinary remedy by foreclosure in the courts, that a majority of the bondholders might require the trustee to avail itself of this remedy and that in the absence of their direction, it might do so at its discretion. The ninth and tenth articles provided that the trustee might purchase at the foreclosure sale, and that a majority in interest of the bondholders might control the exercise of every option given to the Trust Company by the terms of the mortgage. The position of counsel for the appellants is that this mortgage violates the rule against perpetuities, (1) because the lease and the mortgage in fact constitute a tripartite agreement which might suspend the power of the trustee and the bondholders to possess and convey the property mortgaged upon a condition precedent, to-wit: The termination of the lease or the default of the lessee, which might not be fulfilled until 100 years from the date of the lease, (2) because the provisions of the third and sixth articles of the mortgage for the collection by the trustee of the $75,000 and the expenses of the trusteeship annually from the lessee and for the assignment of the lease to the Trust Company by the mortgagor and

the surrender to it of all the rights of the Terminal Company to the rents and income accruing under the lease, in case of the mortgagor's default, tend to prove the suspension of this power and to render the interest of the trustee too remote, and (3) because the powers given to a majority of the bondholders to control the exercise of the options allowed to the trustee in the mortgage have the same tendency. But there is nothing in these two instruments but a lease for 100 years and a mortgage by the lessor of its reversion and of the rents accruing to it from the lessee to secure the payment of its bonds due in ten years. Gray says that the true form of the rule against perpetuities is that "no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Gray's Rule against Perpetuities, § 201. But a vested interest is not subject to the rule against perpetuities, because it is vested and by its very nature it cannot be subject to a condition precedent. For this reason, reversions and vested remainders are exceptions to the rule, and leases for terms far longer than lives in being and twenty-one years are valid, both at common law and under the statute of Iowa, notwithstanding the suspension of the power of the lessors to take actual possession and to convey the property free from the lease. Gray's Rule against Perpetuities, §§ 205, 736; *London & South Western Railway Co.* v. *Gomm*, 20 Chan. Div. 562, 574; *Toms* v. *Williams*, 41 Mich. 552, 572; *Todhunter & Williamson* v. *D. M. I. & M. R. Co.*, 58 Ia. 205, 207. When this is said, all is said. All the remoteness challenged in this case as obnoxious to the rule or the statute is due to the lease and not to the mortgage. The debt secured by the latter falls due by the terms of the bonds in ten years from the date of the mortgage, and the trustee and the bondholders are then entitled, if the debt is not paid, to take possession of and to sell and convey every interest which the lessor reserved under the lease. It is admitted that a mortgage of an unincumbered title to secure a debt due in ten years would not violate the rule. But this mortgage is not more obnoxious to it. The reversion, the right to the rents under the lease and the right to re-enter in case of the failure of the lessor to pay them were all valid in the hands of the lessor notwithstanding their remoteness. The only effect of the

mortgage was to pledge as security remote but valid interests of the mortgagor and to give the right to the possession and sale of them if the debt and interest secured were not paid within ten years. If any of those interests were remote, they were made so by the lease and not by the mortgage, and they were valid because leases are excepted from the rule. The mortgage, therefore, did not offend against either the rule or the statute against perpetuities. Nor is it material whether the lease and the mortgage should be considered as separate instruments or as a single tripartite agreement. If the parties could have lawfully made the lease and the mortgage as separate instruments, a tripartite agreement between them which contained all the terms of the lease and the mortgage must be equally valid. The position that the mortgage and the lease or either of them violate the rule against perpetuites must be overruled.

4. But the appellants insist that the mortgage is void, because the debt which it secures is in excess of the amount of indebtedness which the Terminal Company had the power to contract. The law of Iowa under which this corporation was organized provided that the incorporators must, before commencing any business, except that of their own organization, adopt articles of incorporation and that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock;" provided that these provisions shall not apply to certain classes of bonds, among which we concede for the purpose of this discussion and decision, but do not decide, that the bonds of this corporation do not fall. McLain's Code, §§ 1610, 1611. The articles of incorporation of the Terminal Company declare that its authorized capital stock is $1,000,000 and that "the highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." Those articles, however, did not enlarge the powers of the corporation beyond those granted by the statutes under which it was created and, under the concession we have made, they gave it no authority to incur an indebtedness in excess of

$666,667. A corporation may not enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its articles of incorporation. 5 Thompson on Corporations, § 5996. The indebtedness secured by this mortgage was $1,250,000 and each bond recited that it was one of a series of bonds not exceeding in the aggregate $1,250,000 and that it was secured by a first mortgage upon the property of the Terminal Company. This debt was, therefore, in excess of the statutory limitation. The mortgage was duly recorded in the office of the proper Register of Deeds at Sioux City on February 27, 1890, and from that record and the terms of the bonds it is a fair inference that the Trust Company and the bondholders had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being. On the other hand, the bonds were sold on the credit of the mortgage for 90 per cent. and 95 per cent. of their par value and their proceeds were applied by the mortgagor to the payment of its debts and to the purchase and improvement of its property. Neither the bondholders nor the Trust Company were guilty of any fraud or bad faith in the transaction. The debt was not created nor was the mortgage made or accepted with any intent to defraud any of the existing or subsequent creditors of the corporation. Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subsequent creditors any better standing to assail it? These are the crucial questions in this case.

This is a suit in equity. The Terminal Company has received the full benefit of the proceeds of these bonds and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers. The corporation had, as we have seen, the general power to borrow money and to secure its repayment by a mortgage. If the aggregate amount of the bonds secured by this mortgage had been $650,000 instead of $1,250,000, they would have been valid in the absence of other indebtedness. The bonds and mortgage did not, like the lease in *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St.*

Louis, Alton, &c., Railroad Co., 118 U. S. 290, 309; *Oregon Railway & Navigation Co.*, v. *Oregonian Ry. Co.*, 130 U. S. 1, 23, and *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 50, disable the corporation from performing its obligations to the government and to the public, nor were they, like those leases, beyond the scope of the general powers of the corporation that made them. The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it and the debtor cannot usurp its functions. *National Bank* v. *Matthews*, 98 U. S. 621, 629; *Fritts* v. *Palmer*, 132 U. S. 282, 292; *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 76; *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240, 251. The creation of this indebtedness and the execution of these bonds and this mortgage involve no moral turpitude. The articles of incorporation and the mortgage were spread upon the proper public records, so that all who subsequently dealt with the corporation could see what it had done. The bonds and mortgage had in them no element of fraud, deceit or misrepresentation. They were not evil in themselves. The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts and soon enough for him to set them aside when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains, nor is it any defense for a private corporation against the enforcement of an executed contract whose benefits it holds, that while its execution was within the general scope of its powers it involved an excessive exercise of one of them. While it retains the benefits of such a

contract, it silently affirms and may not be permitted to deny its validity. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99, 102; *Humphrey* v. *Patrons' Mercantile Association*, 50 Ia. 607, 610, 612; *Garrett, Trustee*, v. *Burlington Plow Co.*, 70 Ia. 697, 701; *Warfield* v. *Marshall County Canning Co.*, 72 Ia. 666, 672; *Manchester & L. R. R.* v. *Concord R. R.*, 20 Atl. Rep., 383; *Poole* v. *West Point Butter & Cheese Association*, 30 Fed. Rep. 513, 520; *Allis* v. *Jones*, 45 Fed. Rep. 148, 150; *Parish* v. *Wheeler*, 22 N. Y. 494; *Hays* v. *Galion Gas Light & Coal Co.*, 29 Oh. St. 330, 340; *Bissell* v. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258; *McCluer* v. *Manchester and Lawrence Railroad*, 13 Gray 124; *Bradley* v. *Ballard*, 55 Ill. 413, 418; *Rutland & Burlington Railroad Company* v. *Proctor*, 29 Vt. 93. Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. In *National Bank* v. *Matthews*, *supra*, a bank had made a loan on the security of a note and a mortgage upon real estate under the form of a deed of trust, in violation of sections 5136 and 5137 of revised statutes and was proceeding to enforce collection of its debt by a sale under the trust deed, when one of the state courts enjoined the sale at the suit of one of the mortgagors, on the ground that the loan by the bank on real estate security was forbidden by law and the trust deed was void. The supreme court reversed that decree and allowed the bank to enforce its contract. In *Humphrey* v. *Patrons' Mercantile Association*, *supra*, the Supreme Court of Iowa compelled a corporation to pay to the guilty agent who had contracted it an indebtedness in excess of the limitation prescribed by the statute, and in *Garrett, Trustee*, v. *Burlington Plow Co.*, *supra*, that court enforced the collection of a debt in excess of the statutory limitation against a corporation and in favor of its directors by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves. These decisions do not rest upon the principle of *estoppel*, nor depend upon the creditors' ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts.

5. But it is said that the creditors of this mortgagor are entitled to a declaration that this mortgage is void and that they have rights here superior to the corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the State of Iowa, whose standing in this respect is certainly as high as that of any of the creditors who have appealed. A brief statement, however, of the transactions out of which its claim has arisen, will show, we think, that this position of its counsel is untenable. In the latter part of the year 1889, the Terminal Company commenced to issue its promissory notes for $5,000 each, and to negotiate them through the Union Loan & Trust Company of Sioux City, a corporation which endorsed and sold them to banks located in the Eastern states. The proceeds of these notes were used by the Terminal Company to purchase and improve its property. Early in 1890, the aggregate amount of these notes had reached $1,250,000. It will be remembered that the Terminal Company made its lease to the Sioux City & Northern Railroad Company on December 14, 1889, and its first mortgage to the Trust Company on January 1, 1890. The bonds secured by this mortgage, with the exception of 250 of them which were disposed of in 1892, were sold early in the year 1890, and their proceeds were used to pay some of the Terminal Company's notes and to buy and improve its property. There were, however, some of its outstanding notes that were not paid, and as these fell due, the Terminal Company made new notes, the Union Loan & Trust Company endorsed and sold them and with their proceeds paid the notes which were falling due. In this way the notes of the Terminal Company which were outstanding on April 25, 1893, were renewals of, or substitutions for, some of the notes issued by that company in 1889 and 1890, but it does not appear that any of the banks which held the notes of the company in April, 1893, ever had any of the notes first issued for the original indebtedness of the corporation. The outstanding notes of the Terminal Company on April 25, 1893, aggregated $718,000. They were held by banks located in the Eastern states, and none of them were made or dated earlier than January 1, 1892. In April, 1893, the Terminal Company made a trust deed of all its property to the Union Loan & Trust Company to secure the payment of these

notes. This deed recited that it was subject to the mortgage in suit. The Union Loan & Trust Company, the trustee in this deed, subsequently made a general assignment of all its property and interests to E. H. Hubbard, as trustee. In December, 1893, the Terminal Company assigned all its property to E. H. Hubbard, in trust, to sell the same and apply the proceeds to the payment of its notes. The Credits Commutation Company subsequently became the owner of these outstanding notes of the Terminal Company to the aggregate amount of $616,000. It thereupon sued that company upon these notes in one of th state courts of Iowa, obtained a judgment for their amount and interest on July 23, 1895, had an execution returned unsatisfied and then intervened in this suit, which had been commenced in 1894. E. H. Hubbard, the trustee under the second mortgage and under the assignment of the Terminal Company, is one of the parties to this suit and one of the appellants in this case, so that the rights of the owners of these notes under their second mortgage of April, 1893, under their trust deed of December, 1893, and under their judgment of July 23, 1895, are all here for adjudication. But how can they establish any rights as against the first mortgage upon this property superior to those of the the mortgagor? The equities of the appellants who own these notes cannot be higher than those of their original holders and they became creditors of this corporation subsequent to the sale of all but 250 of the bonds, and probably subsequent to the sale of those. Subsequent creditors stand in the shoes of the mortgagor where the prior mortgage is not obtained and accepted by the mortgagees with intent to defraud them, and this mortgage certainly was not. *Graham* v. *Railroad Company*, 102 U. S. 148, 153; *Mattingly* v. *Nye*, 8 Wall. 370; *Sexton* v. *Wheaton*, 8 Wheat. 229. Moreover, whether the holders of these notes became creditors before or after the bondholders did, they have established no right to attack this mortgage superior to that of the mortgagor. They could maintain no superior equitable claim to attack it, unless they proved that the mortgage was made by the corporation and was obtained and accepted by the trustee and the bondholders with the intent to deceive and defraud them, and that it did deceive and defraud them, and there is no such evidence in this case. They have no legal lien upon the mort-

gaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors. *Warfield* v. *Marshall County Canning Co.*, 72 Ia. 666, 670, 672; *Garrett, Trustee*, v. *Burlington Plow Co.*, 70 Ia. 697, 700, 701, 702; *National Bank* v. *Whitney*, 103 U. S. 99, 103.

6. Another objection to the validity of this mortgage is that the president and secretary of the Terminal Company who executed it on behalf of that corporation, had no authority to do so, because some of the provisions of the mortgage are not identical with those contained in the resolution of the board of directors which authorized its execution. But the Terminal Company delivered this mortgage to the Trust Company, signed by its president and secretary and sealed with its corporate seal. This was *prima facie* evidence that it was executed on behalf of the corporation by lawful authority. *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. Rep. 309, 327; *Burrill* v. *Nahant Bank*, 2 Met. 163, 166; *Canandarqua Academy* v. *McKechnie*, 90 N. Y. 618, 629; *Wood* v. *Whelen*, 93 Ill. 153, 162; *Southern California, &c. Association* v. *Bustamente*, 52 Cal. 192. The mortgage recited that it was duly authorized by a proper resoluion of the board of directors, and each of the bonds recited that it was secured by a mortgage or deed of trust duly made and delivered to the Trust Company which was a first lien upon all the property of the Terminal Company. Upon these representations the Terminal Company sold these bonds and obtained their proceeds. It is too late now for this corporation or for creditors claiming under it through deeds or liens subsequent to the date of the record of this mortgage, to deny the power of its officers to make it. A corporation which induces lenders or purchasers to loan it money or to buy its bonds by delivering a mortgage formally executed, which purports to secure them, is thereby estopped from denying its validity on the ground that in giving its officers authority to make it, it failed to comply with some law or rule of action, with which it might have complied, but which it wilfully or carelessly disregarded. *Union Pacific Railway Co.* v. *Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 188, 191; 2 C. C. A. 174, 239, 241, 51 Fed. Rep. 309, 326, 328; *Zabriskie* v. *Railroad Co.*, 23 How. 381, 397, 400, 401.

7. Finally, the appellants assail the decree because it directs the sale of the mortgaged property as a whole and does not reserve to the mortgagor and to subsequent lienors the right of redemption from the sale in accordance with the provisions of the statutes of Iowa relative to sales of real property under execution. McClain's Annotated Code of Iowa, §§ 4317, 4331. But this statutory right of redemption and right to a sale in separate parcels does not extend to the real estate of a corporation which is mortgaged with its franchise to acquire, hold and use property for public purposes and whose chief value depends upon its unity and its use for, and appropriation to those purposes. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 90. The decree below was right and it must be *affirmed* with costs. It is so ordered.

Filed August 2, 1897.

No. 504. 192.

Brief of Coombs & Taylor for Pet

504

BRIEF OF PETITIONERS.

FILED
NOV 9 1897
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

Filed Nov. 9, 1897.

OCTOBER TERM, 1897.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

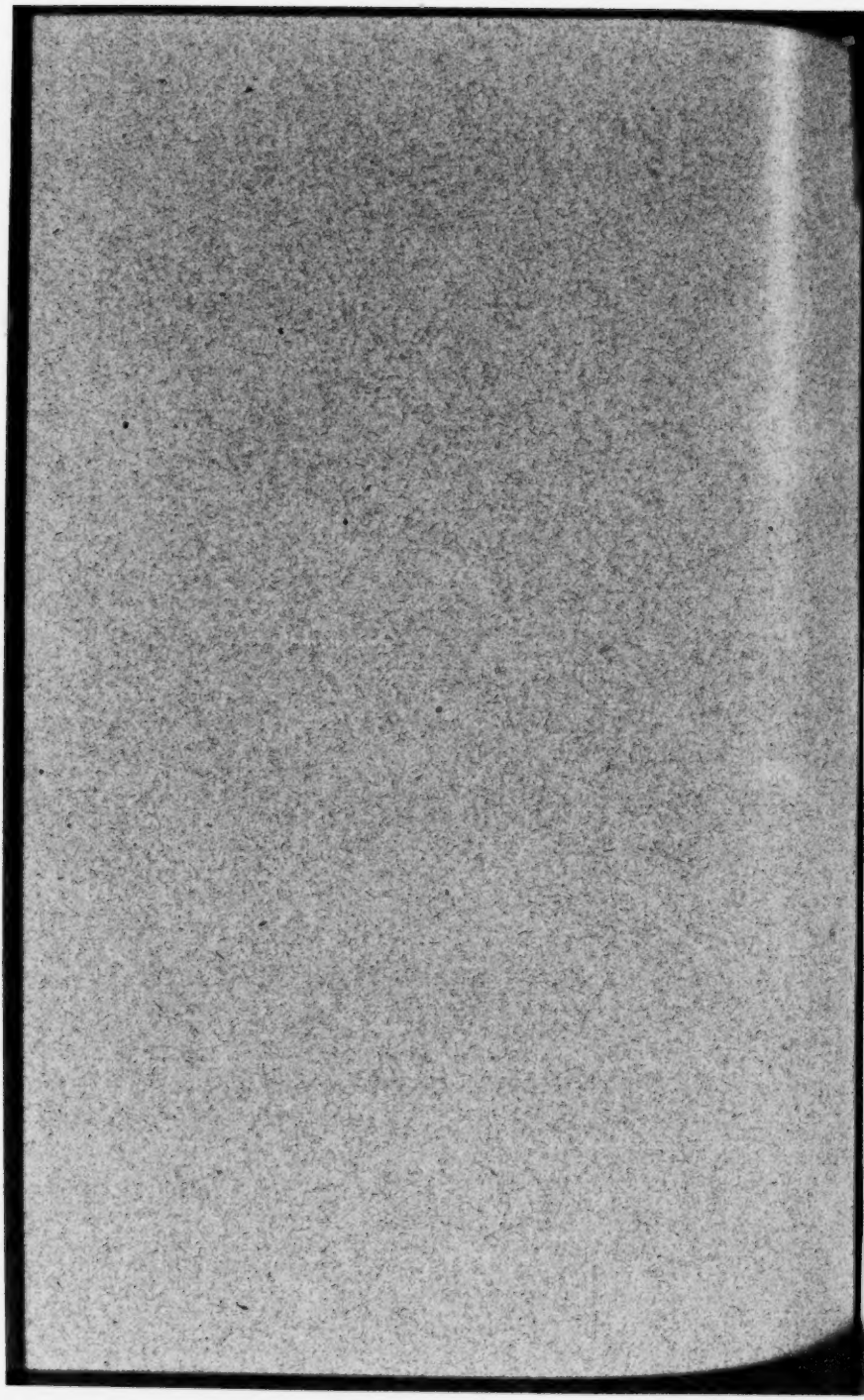
IN THE CASE OF THE

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN & TRUST COMPANY, *Appellants and Petitioners,*

VS.

TRUST COMPANY OF NORTH AMERICA, TRUSTEE, *Appellee and Respondent.*

JOHN C. COOMBS, 25 Equitable Building, Boston, Mass.,
HENRY J. TAYLOR, Sioux City, Iowa,
Counsel and Solicitors for Petitioners.



Iowa Statutes referred to are set out at end of this Brief.

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VS.

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I.

THE INVALIDITY OF THE BONDS AND MORTGAGE.

To support the petition for writ of certiorari, it is essential to show, in whole or in part, the invalidity of the bonds or mortgage.

In the opinion of the Circuit Court of Appeals, both have, by necessary implication, been found to be invalid, and, expressly, a violation of law.

The complainant, in its departure from the case made by the bill and the decree in the Circuit Court, said that the

distinction between the void and voidable character of the bonds "is the first question that ought to be settled in the determination of this case." Has the Court of Appeals settled it, and, if so, how?

This is what the Court of Appeals says:

> "But the appellants insist that the mortgage is void, because the debt which it secures is in excess of the amount of indebtedness which the Terminal Company had the power to contract. The law of Iowa under which this corporation was organized provided that the incorporators must, before commencing any business, except that of their own organization, adopt articles of incorporation, and that 'such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must, in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock;' provided that these provisions shall not apply to certain classes of bonds, among which we concede, for the purpose of this discussion and decision, but do not decide, that the bonds of this corporation do not fall. McClain's Code, §§ 1610, 1611. The articles of incorporation of the Terminal Company declare that its authorized capital stock is $1,000,000, and that 'the highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company.' Those articles, however, did not enlarge the powers of the corporation beyond those granted by the statutes under which it was created, and, under the concession we have made, they gave it no authority to incur an indebtedness in excess of $666,667. A corporation may not enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its articles of incorporation. 5 Thompson on Corporations, sec. 5996. The indebtedness secured by this mortgage was $1,250,000, and each bond recited that it was one of a series of bonds not exceeding in the aggregate $1,250,000, and that

> it was secured by a first mortgage upon the property of the Terminal Company. This debt was, therefore, in excess of the statutory limitation. * * * If the aggregate amount of the bonds secured by this mortgage had been $650,000 instead of $1,250,000, they *would have been valid* in the absence of other indebtedness."

And again:

> "The statute, *whose provisions the bonds and mortgage violate*,"

and elsewhere the opinion concedes the violation of law.

Said Court finds, also, that the bondholders and mortgagee knew of this.

> "The mortgage was duly recorded * * * and from that record, and the terms of the bonds, it is a fair inference that the trust company and the bondholders had full notice that *the indebtedness secured by this mortgage*, was in excess of the limitation prescribed *by the laws of its being*."

The rule seems to be immutable, that a law-breaker does not have clean hands, and can ask nothing of equity.

> "The principle is thus applied in the same manner, when the illegality is merely *malum prohibitum*."
>
> *Reese on Ultra Vires, sec. 74, p. 114.*
>
> *1 Pomeroy, sec. 402, 1st Ed.*
>
> "Equity will never assist a party to carry into effect his own intentional violation of law."
>
> *Ibid, sec. 937.*
>
> *Reese on Ultra Vires, sec. 61.*

If, therefore, the demand of equity in this case to enforce the debt is irresistible, the obstruction is equally immovable.

This mortgage, in its single self, was unlawful—not an innocent part of a guilty aggregate, nor, in that sense, merely an excessive exercise of the power to borrow money. This debt was almost twice over such a contract as the cor-

porations of Iowa can, "by the law of their being," enter into.

The making of the mortgage was in any aspect something more than an excessive exercise of the bower to borrow money; it was an undertaking, also, to convey all the property of the company to secure a direct violation of law.

The recording of it was constructive notice of nothing, and actual knowledge of it was assurance of its invalidity. When the Circuit Court of Appeals found that the debt "would have been valid" if it had been different, that conceded that it is "invalid" as it is; between which and "void," there is absolutely no difference in law.

The complainants' brief said:

> "A void contract is dead, and no equitable inclination can give it life. There is nothing there to enforce, and the court is powerless to bring it into being."

If the bonds were not held to be valid by the exception of the proviso of the Code, then all that the complainants asked was that they should be held to be voidable, and not void.

These were the forces making for and against the status of the bonds.

It is too palpable for discussion, that the statutes and the bonds are running directly against each other. The Circuit Court thought that if he allowed them to collide, the bonds must surely perish, so he tried to sidetrack the bonds on an untenable exception to the statute. The Court of Appeals was tempted to try to do the same thing with the statute, by confining its action to authority on the part of the state to dissolve and oust the promissor and not the promissee.

But the Court of Appeals finally allowed the two to meet in full conflict, and there does not seem to be much left of either. The effect upon the bonds appears to be that they are neither valid nor voidable, but are both void and en-

forceable. The limbo of the statute is, that while it is in full force, it shall be held to run only after conscience.

The result in the Court of Appeals was reached by subordinating the action of the law upon the contract to the power of equity on the conscience of the parties. The Court affirmatively projects a promise that is void through the statutes as a vacuum, because the promissor cannot interpose the statute, which alone shows that the promise is not a substance. Such an apparition, to the mortgagor, cannot so materialize in the healthy conscience of the judgment creditor.

The appellants still think that, as matter of law, the conclusions are erroneous, and that the debt, being a deliberate violation of law, was void, and cannot be brought into existence, and enforced, and the statute suppressed by condiditions, restraints and maxims imposed upon the defendant company. There is a higher power and right than any invoked by this decision—the right of the State to have her public policy for the protection of the credit of her incorporated enterprise protected. And that a creation which the state prohibits, *in rem*, shall not be enforced in court by substituting for that issue one *in personam*.

If it be true, that where good faith, justice and equity require it, a void or voidable contract may be enforced, in behalf of one party, by equitable restraints which forbid the other party to resist or avoid it, there yet remains that it cannot so proceed affirmatively, and, on that basis, as against a party who is not thus restrained. This case shows no equity in behalf of the bondholder as against the judgment creditor.

The Court of Appeals say:

> "But it is said that the creditors of this mortgagee are entitled to a declaration that this mortgage is void, and that they have rights here superior to the

> corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the state of Iowa, whose standing in this respect is certainly as high as any of the creditors who have appealed."

If that declaration was what the Credits Commutation Company was asking, then, possibly, that company might be held to stand in the mortgagor's shoes. It would have to stand there to do that, for no one else can assert a right to that declaration. The judgment creditor never asked it, unless in some careless use of language; he can't; he only asks that the contract be not enforced as against his lien, or allowed to take all the assets.

He goes further, and will concede that if his indebtedness had been contracted after the mortgage, but with any intent to attack the mortgage and get his pay in that way, equity might be loth even to protect his lien.

Indeed, he did go much further; he conceived that equity might be reluctant to protect even an innocent lien, if the consequences must be to discharge the obligations of the mortgagor to the mortgagee; or, if even it would let the judgment creditor into priority of lien. So he made the offer for equality, that the invalidity of the mortgage should not impair the debt, and that he would wave his own lien.

There is no novelty or paradox in the position in which the court places the bonds, or in the decision, to which the judgment creditor excepts. The novelty in his own offer anticipated, and fits, the situation. If no court has ever considered such an offer, it is safe to say that no court ever had a chance, and, on the other hand, no such conspicuous and flagrant a violation of law, if any appears to have been hitherto affirmatively enforced in equity.

Is it necessary to go to the extent of the Court of Appeals and distinguish the violation of law for reward, and affirmatively enforce the lien of an unlawful mortgage, against the

free conscience and in priority of the lien of other creditors whose unconscious money went into its enhancement?

II.

THE ENFORCEMENT OF THE BONDS AND MORTGAGE RESTS IN EQUITY ALONE.

The Court of Appeals, after conceding the invalidity of the bonds, and stating carefully and freely, even generously, the contentions of the appellants, as if the strength of the court rejoiced in the difficulties it encountered, made an answer invoking the equities of the case.

To keep in mind the extent to which the Court of Appeals goes in reliance upon its equity powers, the judgment creditor begs leave to reprint its answer to the contentions of the defendant Terminal Company. It is worthy of much repetition.

> "This is a suit in equity. The Terminal Company has received the full benefit of the proceeds of these bonds, and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers. The corporation had, as we have seen, the general power to borrow money, and to secure its repayment by a mortgage. If the aggregate amount of the bonds secured by this mortgage had been $650,000 instead of $1,250,000, they would have been valid in the absence of other indebtedness. The bonds and mortgage did not, like the lease in *Thomas vs. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad Co. vs. St. Louis, Alton, etc., Railroad Co.*, 118 U. S. 290, 309; *Oregon Railway and Navigation Co. vs. Oregonian Railway Co.*, 130 U. S. 1, 23; and *Central Transportation Co. vs. Pullman's Palace Car Co.*, 139 U. S. 24, 50, disable the corporation from performing its obligations to the Government, and to the public, nor were they, like those leases, beyond the scope of the general powers of the corporation that made them. * * * The creation

of this indebtedness, and the execution of these bonds, and this mortgage, involve no moral turpitude. The articles of incorporation, and the mortgage, were spread upon the proper public records, so that all who subsequently dealt with the corporation could see what it had done. The bonds and mortgage had in them no element of fraud, deceit, or misrepresentation. They were not evil in themselves. The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits, and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts, and soon enough for him to set them aside, when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract, whose benefits he retains, nor is it any defense for a private corporation against the enforcement of an executed contract whose benefits it holds, that while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While it retains the benefits of such a contract, it silently affirms, and may not be permitted to deny, its validity. *National Bank vs. Matthews*, 98 U. S. 621; *National Bank vs. Whitney*, 103 U. S. 99, 102; *Humphrey vs. Patrons' Mercantile Association*, 50 Ia. 607, 610, 612; *Garrett, Trustee, vs. Burlington Plow Co.*, 70 Ia. 697, 701; *Warfield vs. Marshall County Canning Co.*, 72 Ia. 666, 672; *Manchester & L. R. R. vs. Concord R. R.* 20 Atl. Rep. 383; *Poole* vs. *West Point Butter and Cheese Association*, 30 Fed. Rep. 513, 520; *Allis vs. Jones*, 45 Fed. Rep. 148, 150; *Parish vs. Wheeler*, 22 N. Y. 494; *Hays vs. Galion Gas Light and Coal Co.*, 29 Oh. St. 330, 340; *Bissel vs. Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258; *McCluer vs. Manchester and Lawrence Railroad*, 13 Gray, 124; *Bradley vs. Ballard*, 55 Ill. 413, 418; *Rutland & Burlington Railroad Co. vs. Proctor*, 29 Vt. 93 Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to

enforce such a contract. In *National Bank vs. Matthews, supra*, a bank had made a loan on the security of a note, and a mortgage upon real estate, under the form of a deed of trust, in violation of sections 5136 and 5137 of Revised Statutes, and was proceeding to enforce collection of its debt by a sale under the trust deed, when one of the state courts enjoined the sale at the suit of one of the mortgagors, on the ground that the loan by the bank on real estate security was forbidden by law, and the trust deed was void. The Supreme Court reversed that decree, and allowed the bank to enforce its contract. In *Humphrey vs. Patrons' Mercantile Association, supra*, the Supreme Court of Iowa compelled a corporation to pay to the guilty agent who had contracted it, an indebtedness in excess of the limitation prescribed by the statute, and in *Garrett, Trustee, vs. Burlington Plow Co., supra*, that court enforced the collection of a debt in excess of the statutory limitation against a corporation, and in favor of its directors, by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves. These decisions do not rest upon the principle of estoppel, nor depend upon the creditors' ignorance of the excessive indebtedness. They stand upon the rule that 'he who seeks equity must do equity,' and upon the principle that one may not, at the same time, accept the benefits and repudiate the burdens of his contracts."

It is safe to say that this is where the defendant appellant, Terminal Company, lost its case.

It is equally true that, without this, the case would have been decided the other way. This is all immaterial, if the bonds are not invalid, and it is submitted that the equity invoked does not make against the judgment creditor in the least.

In the preceding quotation, the court says: "The creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers," and upon this distinction turns the case, and rejects our long list of authorities.

In the case of *McPherson vs. Foster Bros.*, 43 Iowa, 48, the court construed the following language, to wit:

> "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county, or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness,"

And, in the opinion, said:

> "What is the effect of the inhibitory constitutional and statutory provisions upon the indebtedness which exceeds the prescribed limits? (p. 56). * * This limitation, we argue, is a direct and positive prohibition (p. 57). * * There is no distinction in reason between the cases of an entire absence of enactment conferring power, and a prohibition of its exercise beyond a certain limit. They are in fact one and the same case. In the first instance, power is not granted, and is not, therefore, possessed. In the other, it is expressly withheld, and its exercise prohibited, and is, therefore, not conferred. There is in each case a total absence of authority (p. 58). * * It is equally plain that if power be conferred to be exercised to a certain extent, and no farther, when the limit is reached, the power ceases. These principles are evident, and do not require the support of authority. No other rules which keep corporations in subordination to the state, or be in harmony with the fundamental doctrine above announced, namely: all power of corporations is derived from positive enactment (p. 58). * * We have established above that a condition or limitation upon a power whereby it ceases at a certain point, as effectually defeats its exercise beyond the limit, as though no power had been created at all (p. 59). * * When the limitation is passed, there is the same absence of power as though none had ever been conferred. Otherwise, the condition in limitation would be without effect (p. 59). * * *Power is not only withheld, but a prohibition is placed upon its exercise* (p. 63). * * It is a pro-

> hibition upon the exercise of the power, by forbidding the legislature to confer authority upon municipalities to create indebtedness beyond a certain limit. The creation of such an indebtedness is not only unauthorized, but illegal, and contrary to the settled policy of the State as declared in the Constitution (p. 63)."

This rule of construction by an Iowa court, by analogy, destroys the distinction made in this case against us.

The Minnesota Supreme Court, in *Kraniger vs. Peoples Building Society*, 61 N. W. R. 904, held, page 906:

> "But there can be no distinction in principle between a case where the charter, or articles of association, prohibit a thing altogether, and where it is prohibited beyond a certain limit. In the one case, there is a total absence of authority to do the thing at all, and in the other, a total absence of authority to do it beyond a certain limit, and after that limit is reached there is as much an absence of authority in the latter case as there was in the former."

This distinction of the Court of Appeals ought not to prevail in a case like this, where the bonded indedtedness, as a single transaction, is, and upon its face proclaims itself to be, a deliberate violation of law. Especially is this true in a case purporting to be determined on relative equities.

III.

THE RIGHT OF THE JUDGMENT CREDITOR TO PROTECTION UNDER THE STATUTE IS NOT IMPAIRED BY ANY RIGHT WHICH THE STATE MAY HAVE TO DISSOLVE THE DEFENDANT TERMINAL COMPANY.

The foregoing is the whole argument of the court on the question of the enforcibility of the contract, except an omitted part which is in discord with, and separable from, the rest. It is this:

> "The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a viola-

> tion. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it, and the debtor cannot usurp its functions. *National Bank vs. Matthews*, 98 U. S., 621, 629; *Fritts vs. Palmer*, 132 U. S., 282, 292; *Logan County National Bank vs. Townsend*, 139 U. S. 67, 76; *Thompson vs. St. Nicholas National Bank*, 146 U. S. 240, 251."

This point is entirely independent. It is taken from the complainant's brief, and appears to have been availed of by the court for whatever it may be worth. It was pressed in the Circuit Court, and was there ignored. If it is good, it is good enough; if not, it is submitted, it mars the opinion. It renders unnecessary and irrelevant, and is even inconsistent with, all the equitable considerations on which the decision in the Court of Appeals is declared to rest. It is the same in its relation to the concessions made in the statement and premises of the opinion for the benefit of the contentions of the appellants. It deals with the statute and the contract, and not with any good faith, justice or equity, that demand the enforcement of the contracts, nor with conscionable restraints which should be imposed upon the parties. There is no equity in it. It undertakes to meet law with law, just as did the opinion of the Circuit Court. It is interpolated only in the argument against the defendant Terminal company, and is not referred to in the reasons for deciding against the judgment creditor. It is not sound in reason.

It is true that the statute prescribes no penalty for perpetrating the offense; but it couldn't, for it purported to prohibit its commission; it rendered punishment for violation impossible. To have prescribed a penalty would have vali-

dated the violation. That is the ordinary construction. There is but one penalty which could be prescribed that would not have that effect. It is the one the complainant suggested, and the Court of Appeals seemingly adopts it as necessary to avoid the obligation. It is said that if the legislature intended the violation to be void, it should have said so; but a declaration that the unauthorized indebtedness should be void, would be absurd. It would add to a statute, which now reads, in effect, that an Iowa company can, in no case, subject itself to any such indebtedness, the contradiction, "and *if it does*, the debt shall be void"—a Hibernianism which, for reasons on its face, cannot be regarded seriously.

The statute is a declaration of a prohibitory public policy, "in no case" to be violated; and, to secure this, it incapacitates any voluntary commission of the offense. To effect that, it had to stop where it did.

Reese on Ultra Vires, sec. 69, p. 102.

Sharpe vs. Teese, 9 N. J. L. 352.

It is said that it is not the province of the court to declare this indebtedness to be void. The court can't do so. If the court could do that, it could declare it to be valid, and the Court of Appeals does not attempt to do that. But isn't there a little inconsistency beyond that? After declaring that it is not the province of the court to declare the debt to be void because the statute doesn't say so, it is immediately added that the remedy is "ouster and dissolution *in a suit* by the state." Does the statute say that, either? Surely the death penalty is not the only one which the court can inflict, where none is prescribed?

It may be that such a suit in behalf of the State would lie; but would its success atone for the violation, and thus invalidate the debt? If so, it would become worthless in the

very judgment that legalized it; for there would no longer exist a debtor to answer to the precept to enforce it.

The cases cited on this point are dicta, and not direct authority. The task would, probably, be hopeless to find a precedent in which the United States, or a State, has ever even tried to oust, or dissolve, a corporation for violation of this, or any like statute.

The cases referred to in the opinion of the Court of Appeals are usually cited in a bunch, just as they are here. They are all national bank cases, decided by Federal Courts. The banks are the currency agents of the Government, and the latter guarantees their circulation in consideration of first liens on all their assets, and the Federal Courts have protected an exclusive control over them by the United States to an extent that distinguishes the decisions of those courts in all such cases.

The Supreme Court itself, in *Cal. Nat'l Bank vs. Kennedy*, 167 U. S. 362; *McCormick vs. Market Nat'l Bank*, 165 U. S. 538; *Bank vs. Townsend*, 139 U. S. 67, 76, limited very much what that court had said in *Bank vs. Matthews*, 98 U. S. 621, as is shown in *Dresser vs. Traders' National Bank*, 165 Mass. 120, 122, where this line of cases was recently considered. However, the point did not satisfy the courts in the decisions that contain it, and they expressly limit the enforcement which they authorize of prohibited contracts to the parties to the contract. It is hardly conceivable that a Federal Court would adjudicate a statute of Iowa practically out of existence on their federal decisions in respect to national banks, but would wait for some adjudication to that effect from an Iowa court. But the statement in the opinion, if true, is demurrable.

There are four parties whose interest, under the Iowa statutes, have been recognized by the courts: the company, its stockholders, its creditors, and the State.

Death is not a remedy. If imposed as a penalty at the suit of the State, it is not "*the* remedy" for any of the parties in interest, except the State, and, for the State, it is *a* remedy only to enforce an observance, and not to sanction a violation, of its public policy.

Among the other parties in interest, it must be conceded that the creditor has standing. Even the cases which it was thought would, by analogy, limit his interest to the protection of such claims of his own as were prior in time to the unlawful transaction, necessarily concede to him a standing.

It is submitted, therefore, that so much of the opinion as was last quoted, and is under consideration, should not be held to limit the scope and effect of the statute to a suit by the State for ouster and dissolution. And that, as between the parties, the decision may be held to rest where the opinion expressly placed it, on the equities of the case.

IV.

THE DECISION AGAINST THE JUDGMENT CREDITOR IS NOT EQUITABLE.

And thereupon the judgment creditor asks leave to reprint so much of the opinion of the Circuit Court of Appeals as considers, and purports to dispose of, his standing and defense.

> "But it is said that the creditors of this mortgagor are entitled to a declaration that this mortgage is void, and that they have rights here superior to the corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the State of Iowa whose standing in this respect is certainly as high as that of any of the creditors who have appealed."

The court then reviews the transaction out of which the judgment grew, and from which we make extracts as follows:

> "In the latter part of the year 1889, the Terminal Company commenced to issue its promissory notes

for $5,000 each, and to negotiate them through the Union Loan & Trust Company, of Sioux City, a corporation which endorsed and sold them to banks located in the Eastern States. The proceeds of these notes were used by the Terminal Company to purchase and improve its property. Early in 1890, the aggregate amount of these notes had reached $1,250,000. It will be remembered that the Terminal Company made its lease to the Sioux City & Northern Railroad Company on December 14, 1889, and its first mortgage to the Trust Company on January 1, 1890. The bonds secured by this mortgage, with the exception of 250 of them, which were disposed of in 1892, were sold early in the year 1890, and their proceeds were used to pay some of the Terminal Company's notes, and to buy and improve its property. There were, however, some of its outstanding notes that were not paid, and as these fell due, the Terminal Company made new notes, the Union Loan & Trust Company endorsed and sold them, and with their proceeds paid the notes which were falling due. In this way, the notes of the Terminal Company which were outstanding on April 25, 1893, were renewals of, or substitutions for, some of the notes issued by that company in 1889 and 1890, but it does not appear that any of the banks which held the notes of the company in April, 1893, ever had any of the notes first issued for the original indebtedness of the corporation. The outstanding notes of the Terminal Company, on April 25, 1893, aggregated $718,000. They were held by banks located in the Eastern States, and none of them were made, or dated, earlier than January 1, 1892."

"The Credits Commutation Company, subsequently, became the owner of these outstanding notes of the Terminal Company, to the aggregate amount of $616,000. It thereupon sued that company upon these notes in one of the State courts of Iowa, obtained a judgment for their amount, and interest, on July 23, 1895, had an execution returned unsatisfied, and then intervened in this suit, which had been commenced in 1894."

To these findings the judgment creditor begs leave to add:

That it was not claimed by either side that the proceeds of notes or bonds had been diverted; and all the original proceeds, represented by both, went directly, or in renewals, into the property of the defendant Terminal Company, and that the complainant, to maintain its case on the basis of the decision of the Circuit Court, contended that, at the time of the mortgage, the property was worth twice the sum of the bonds.

And further, to quote from the findings of the opinion, as follows:

> "The mortgage was duly recorded in the office of the proper Register of Deeds of Sioux City, on February 27, 1890, and from that record, and the terms of the bonds, it is a fair inference that the Trust Company, and the bondholders, had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being."

The petitioners do not claim that that recording conveyed any such notice, but say that none was needed to the mortgagee Trust Company itself, nor to actual bondholders. The court decides against the judgment creditor as follows:

> "But how can they establish any rights as against the first mortgage upon this property superior to those of the mortgagor? The equities of the appellants who own these notes cannot be higher than those of their original holders, and they became creditors of this corporation subsequent to the sale of all but 250 of the bonds, and probably subsequent to the sale of those. Subsequent creditors stand in the shoes of the mortgagor, where the prior mortgage is not obtained and accepted by the mortgagees with intent to defraud them, and this mortgage certainly was not. *Graham vs. Railroad Co.*, 102 U. S. 148, 153; *Mattingly vs. Nye*, 8 Wall. 370; *Sexton vs. Wheaton*, 8 Wheat. 229. Moreover, whether the holders of these notes became creditors before or after the bondholders did, they have established no right to attack this mortgage superior to that of the mort-

> gagor. They could maintain no superior equitable claim to attack it, unless they proved that the mortgage was made by the corporation, and was obtained and accepted by the trustee, and the bondholders, with the intent to deceive and defraud them, and that it did deceive and defraud them, and there is no such evidence in this case. They have no legal lien upon the mortgaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors. *Warfield vs. Marshall County Canning Co.*, 72 Ia. 666, 670, 672; *Garrett, Trustee, vs. Burlington Plow Co.*, 70 Ia. 697, 700, 701, 702; *National Bank vs. Whitney*, 103 U. S. 99, 103."

The difference between the strength of this and that with which the Court disposed of the mortgagor, only needs to have attention called to it. Not only so, but the answers to the two appellants are so different, that the first answer to the Court's decision against the judgment creditor is the sentence with which the Court opened its own answer to the mortgagor: "This is a suit in equity."

In law, everything or nothing goes one way in a single issue, between two parties, only, but equity is not bound to do wholesale alone. It may work out a share of justice to each of many, according to his interest, and the circumstances of his case.

The Court will be indulgent of the natural impulse of the creditor, to take warm and immediate exception to the suggestion that he stands in the shoes of the debtor in this case.

However innocent of moral turpitude the mortgagee may have been—and we concede that he was conscious of, and intended none—this mortgage was, nevertheless, a fraud, in fact, by the mortgagor against the note-holders, both those existing and subsequent ones who did not know of it; and none of them knew. It is submitted that, in no equitable sense, and for no equitable purpose, can the victim of a crime

be held to "stand in the shoes" of its perpetrator, subject to the same judgment and for the same reasons. All that the Court of Appeals said in righteousness for the bondholder against the debtor, should be more earnestly repeated in behalf of the judgment creditor, and not cited against him; for the judgment creditor and the bondholder stand side by side against the debtor, except that the judgment creditor is both more innocent, and has suffered the greater wrong.

So, even except where there is fraud, it is submitted that neither for equitable nor legal reasons, should the authorities cited by the Court of Appeals to sustain the proposition that a subsequent creditor stands in a debtor's shoes apply here. The Court cites these cases:

Graham vs. Railroad Company, 102 U. S. 148.
Mattingly vs. Nye, 8 Wall. 370.
Sexton vs. Wheaton, 8 Wheat. 229.

All of these suits were brought by judgment creditors, proceeding affirmatively in equity, to effect cancellations of prior conveyances, and settlements made by grantors, solvent at the time, and made before the debts in judgment were contracted, and they contained no offer to do any equity whatever. They are all distinguished on the vital point—that the conveyances which were attacked were all valid and lawful when made, but this mortgage at bar never was, and isn't yet; no other debt is prior or subsequent to it as a legal indebtedness on the bonds.

The mortgagee and bondholders take nothing from their contract as lawful, but everything from the grace of the Court, and the power of equity, acting upon the consciences of the parties. They have the burden, but it is not even shown that all other existing debts were contracted after all the bonds were sold; the Court expressly leaves that in doubt, with, perhaps, an inclination to the contrary. Under the record our notes clearly antedate the sale of $250,000 of

the bonds; so that the mortgage should have precedence only to the extent of a million dollars, and an accounting should be had to determine which of the bonds offered were sold subsequent to the indebtedness of the judgment creditor. More than that, the notes of the judgment creditor, by renewals and substitutions, antedate the mortgage and the sale of every single bond thereunder. And if the mortgage fail for that defect and to that extent, the amount of claims thus involved is material, and the judgment creditor has standing to raise that question. So, in no equitable sense, and for no equally equitable purpose, can it be said that "the same considerations which have defeated the defence of the mortgagor, make this mortgage impregnable to the assaults of these creditors."

The judgment creditor does not assault the mortgage, and especially not the bonds it purports to secure; he can't do so. He would have to stand in the mortgagor's shoes to do that. He can't prevent the debtor from paying, nor the enforcement of the mortgage, as against the mortgagor, however invalid. That is none of the judgment creditor's business. He can say, however, that its satisfaction out of the security shall be wholly or partially postponed to the payment of his own claim. He takes neither subject to the mortgagor's conscience, nor in acknowledgment of the mortgagee's liens or equities. The question is of his standing, simply, to assert and defend his own judgment lien as against an invalid mortgage. He attacks nobody. On the contrary he says here that if the maintenance of his legal defence would yield to him an inequitable preference over the bonds and mortgage, he will waive it, and share in equality, pro rata, with the bondholders. He does not stand in the mortgagor's shoes, nor should a Court in Equity force such uncomfortable ones upon his unwilling feet.

But the rest of the sentence is more grievous. It is sub-

mitted that the considerations that defeated the defence of the mortgagor were these: That the mortgagor made the mortgage, received the money, and promised to pay the bonds; and good faith, justice and equity demand that, until he pays as he promised, the mortgage should be enforced against him. If he seeks in equity to have the cloud of the mortgage lifted, or to stay its enforcement, equity requires him to do equity, and to pay back, as he promised, that which he borrowed on the faith of the security.

Take this out of the opinion, and there is nothing of equity left to sustain it.

Yet, what of it pricks the judgment creditor's conscience? He received nothing from the mortgagee; has done to him no wrong; has promised nothing to him; owes to him neither money, nor lands, nor precedence, nor recognition, nor duty, nor equity, nor anything which narrows the shoes that pinch or cripple the mortgagor. Neither does he ask any equity. He defends a lien at law.

So that if this mortgage should be impregnable to assault by the judgment creditor, it is submitted that it is not so for the same considerations which this opinion assigns for defeating the defendant company. This, it is submitted, also answers the suggestion of the Court of Appeals that the creditor has established no right to attack the mortgage superior to that of the debtor; for he has a lien which gives him standing, and he is free from the restraints which good faith, justice and equity, and an obligation to do equity, impose upon the mortgagor, and forbid him to defend, and on which this case is decided against the mortgagor. And, besides, the creditor offers to do equity when none can be asked of him. For what principle of equity requires an honest judgment creditor to bow at all to an unlawful contract, in which he took no part? Or, where has it been said that, in equity, it doesn't make a bit of difference whether a mort-

gage, which it is sought to enforce, is lawful or unlawful, provided the guilty mortgagor ought, in conscience, to do something for the unlawful mortgagee?

V.

THE REMAINING AUTHORITIES CITED AND FURTHER SUGGESTIONS OF THE COURT OF APPEALS DO NOT DEMAND THE DECISION RENDERED AGAINST THE JUDGMENT CREDITOR.

The authorities cited by the Court of Appeals at the end of the decision against the judgment creditor, are:

Warfield vs. Marshall County Canning Co., 72 Ia. 666.
Garrett, Trustee, vs. Burlington Plow Co., 70 Ia. 697.
National Bank vs. Whitney, 103 U. S. 99-103.

They are not cited as peculiar alone to the immediate point, but generally, there and elsewhere, as pertinent to the case, especially in connection with one other Iowa case (*Humphrey vs. Patrons' Mercantile As'n*, 50 Ia. 607), all in the complainant's brief, as if to suggest that the courts of Iowa had settled the matter. It is submitted that they appear to have been relied upon as authority for taking the court too far:

Say the court:

> "In *Humphrey vs. Patrons' Mercantile Association*, The Supreme Court of Iowa compelled a corporation to pay to the guilty agent who had contracted it, an indebtedness in excess of the limitation prescribed by the statute."

The limitation prescribed by the *statute* wasn't in issue, nor referred to in that case, but only the limitation fixed in the *articles*, which the Court of Appeals itself says is immaterial.

The same is true of

Warfield vs. Marshall County Canning Co.

Neither was any indebtedness in that case enforced. It was

an attack by a judgment creditor upon the mortgage, and his petition was dismissed. Oddly enough, so far as the statute limitation is concerned, the petitioner in that case insisted that the company should be estopped from denying that its capital was a sum which was abundantly large to bring the debt within the statutory limitation. He did not attack on the ground that it wasn't.

The Court of Appeals continues:

> "And in *Garrett, Trustee, vs. Burlington Plow Co.*, that court (Supreme Court of Iowa) enforced the collection of a debt in excess of the statutory limitation against a corporation, and in favor of its directors, by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves."

The indebtedness enforced in that case did not, in itself, exceed the statutory limitation. That it does so in the case at bar was rightly considered by the Court of Appeals, and by the Circuit Court, as the feature which distinguished it from an excessive aggregate indebtedness, made up of parts, each of which was within the limitation.

In both of the last two Iowa cases, the courts expressly say that they *do not* understand the limitation to be insisted upon, though one of them adds that indebtedness in excess of the limitation can be enforced against the company, which is undoubtedly true, for instance, in *quantum meruit*.

The Iowa court, or any other court we know of, has never said that a single indebtedness so violating the statute has been upheld and affirmatively enforced on the contracts as such. Such a contract, proclaiming its own violation of law, and one whose violation rests on extrinsic evidence, is distinguishable, and absolutely distinguished. Where a recovery cannot be had on the instrument itself, without disclosing and proving its violation of law, recovery on the instrument is denied. Where extrinsic evidence is necessary to show such violation, the rule may be different.

The Court of Appeals adds: "These decisions do not rest upon the principle of estoppel." But *Humphrey vs. Patrons' Mercantile Association*, 50 Iowa, 607, says that it does.

The Court of Appeals says so, too, in this case: "A man cannot plead his own wrong to relieve him from the obligations of an executed contract, whose benefits he retains."

The Court continues: "Nor (do these decisions) depend upon the creditor's ignorance of the excessive indebtedness."

But, in the Humphrey case, the only Iowa case in which it is discussed, the court does expressly reserve that point, saying: "We are of the opinion, in view of the importance of upholding corporate credit *and protecting creditors who have parted with their property in ignorance of the fact* that the limit had been exceeded, that *the corporation* should be *estopped* from setting up that fact."

And again the Court says:

"Nor is the innocence nor ignorance of the creditor essential to the maintenance of his suit to enforce such contract."

As against everybody but the other party, in equity, it must be. Courts of equity do not sit to enforce conscious violation of law in behalf of the guilty and against the innocent. The case relied upon is *National Bank vs. Matthews*, 98 U. S. 621. There was a dissenting opinion. The case was afterwards limited. *Bank vs. Townsend*, 139 U. S. 67; *Dresser vs. Bank*, 165 Mass., 120; *McCormick vs. Bank*, 165 U. S. 538. *Cal. Nat'l Bank vs. Kennedy*, 167 U. S. 362. *Bank vs. Matthews* is one of the decisions, heretofore noticed, of Federal Courts, to enable national banks to realize on real estate security. The statutes thus violated are in the nature of special legislation, confined to these currency agents of the Government, and the decisions of the Supreme Court concerning them are, for the most part, special adjudications.

But this case of Bank vs. Matthews is a leading case. It goes directly upon estoppel, as does the eminent authority

from whom it quotes. And it expressly eliminates and protects everybody not parties to the unlawful transaction.

Thus, this case, and those that follow it, are affirmative authorities for the petition now presented.

Quoting from Sedg. Stat. & Const. Constr., 73, the Court says (and it is made the headnote of the case):

> "Where it is a simple question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a *party who has had the benefits of the agreement cannot be permitted*, in an action founded upon it, to question its validity."

So, in Bank vs. Townsend, the power to enforce a *malum prohibitum* was expressly limited to the same parties.

Of Warfield vs. Canning Company, and Garrett vs. Plow Company, it should further be said that the principle, if not the only, issue in both, as stated by the court, was whether a creditor director, in an insolvent corporation, can avail of his position to secure a preference out of its assets to himself; and, resting on Wait vs. Buckingham, 16 Ia. 284, they decided that he can. Michigan thinks so, too. So does Virginia, and probably Missouri. Substantially, all other States think differently.

Further, in deciding against the judgment creditor, the Court of Appeals says:

> "They (the judgment creditors) have no legal lien upon the mortgaged property, prior to that of the mortgage."

But the lien of the mortgage is not legal; it is equitable only; while the judgment creditor's lien is legal, and his debt admittedly older than one-fifth of the bonds.

In this connection we ask briefly to revert to our exception to the proposition in the opinion that this mortgage and debt were only an excessive exercise of a general power on the part of the Terminal Company to borrow money.

That is what it would have been if the mortgage had been for a debt within the limitation, and, as the Court of Appeals, itself, says, "*in the absence of other indebtedness.*"

An aggregate excess of innocent debts is only an excessive exercise of a lawful power to borrow.

Any of such debts are, at worst, voidable only; for the payment of one might cure all the rest, and, above all, every one of them might have been contracted without knowledge that the limit was exceeded.

A doctor has a general power to administer poison; often he can't save life without, but he musn't give a single dose which he knows will kill. It isn't the excessive grains that are considered, nor would that view limit his act to one of an excessive exercise of a general power; the difference in degree has made it an act of the widest possible difference in kind.

But, to sustain the petitioner's offer, it is not so much the debt that the petitioner finds fault with, as the mortgage. In that paper all the excesses were concentrated. It was notice, like the bonds, that the statute was violated.

> "Resolved: That this Company make and issue, in the name and under the corporate seal of this company, 1,250 bonds, of the sum of $1,000 each." (Transcript, p. 143).

That was not merely an excessive exercise of the lawful power to borrow money. It was not only that, and something more, but it was also that and something different, a pledge of its lands in forfeiture. This is said, in part, to a point presented, but not expressly considered, by the Court of Appeals.

The Court seems to rely somewhat on the fact stated in the opinion—that the mortgage was recorded at the time, in Woodbury County, Iowa.

The Court cites *National Bank vs. Whitney*, 103 U. S. 99, 103. That case only decided that a mortgage, junior in

fact, but recorded, takes precedence of an earlier, unrecorded one.

The Court of Appeals, evidently, felt reluctant to say that, in a decision which rested on equity alone, the Eastern creditors, fifteen hundred miles away, should be held to be affected by constructive notice, when, in fact, there was no evidence, and couldn't be, that any of them knew anything about the mortgage.

But the Court carefully stated the facts, and cited the law, on which the argument of constructive notice could be inferred.

It cannot be contended that a man may validate a violation of the law by publishing notice of his attempt. The notes were each, $5,000 in amount, and each silent as to any other note. In each such transaction, the Terminal Company, necessarily, represents that its aggregate indebtedness is not in excess of law. This presumption may even be conclusive. But it has no force with the bondholders, for the face of their instruments proclaim the fact that, by them, the law is violated. The recording act does not reach the note holders. The act is not intended to give constructive notice of indebtedness against a corporation, in whole or in part; certainly not of an excessive and unlawful debt. The note purchaser is not sent to the records to find out the indebtedness of the company. In his favor, the presumption is not only *prima facie*, but conclusive, that the limit of indebtedness has not been reached. This presumption is stronger than, and will be upheld against, any constructive notice of a recorded mortgage, even if such mortgage must further be presumed, outside the record thereof, to have been satisfied, or sufficiently reduced in amount. The equity rests with the note holder. Equity never rests with contracts violative of law, against non-participating, innocent third parties.

Certainly there was no lawful record of any prior lawful lien; the judgment lien is the first one. Can a violation of law be lawfully recorded? If so, is it constructive notice of anything but its own invalidity, and, therefore, a warrant that it need not be regarded?

VI.

THE JUDGMENT CREDITOR OFFERS TO TAKE A DECREE WHICH WILL REQUIRE A WAIVER OF ALL LIENS, AND THE ADMISSION OF ALL CREDITORS TO PRO RATA PARTICIPATION IN THE ASSETS.

The Court of Appeals, in opening its refusal to protect the judgment creditor, asked: "How can they establish any rights as against the first mortgage upon this property superior to those of the mortgagor?"

The Court asks this as if inviting an answer. The judgment creditor accepts the premises, as declared by the Court, that this is a suit in equity. The decision rests upon the rule that one who asks equity must do equity. The judgment creditor says he is willing to do it, and makes an offer such as no other judgment creditor ever made, at least in any reported case, to the holders of an invalid mortgage. That distinguishes this case.

It establishes a right superior to that of the mortgagor, not against the first mortgage, for the judgment creditor does not attack it; nor against the debt, for it is not his debt. He only denies that, under the principles and maxims of equity, either of these is superior to his own, and, holding the respondent to the like duty with himself, he challenges a comparison so as to see how far the Court will proceed affirmatively in behalf of the invalid mortgage, against this valid judgment, under the circumstances of this case.

He admits that the mortgagees are guilty of no moral turpitude, and that the mortgage was not an evil in itself. The same is more true of himself, and of his own claim.

Nevertheless, the mortgage did, in fact, work a grievous injury to the judgment creditor, for more than $600,000 of his money went into the permanent improvement of the mortgagee's security, leaving not a dollar of assets, or equity, in the borrower with which to pay him, because the mortgage is too large by nearly one half. In this case, the measure of the judgment creditor's injury is almost exactly the measure in which the mortgage violates the law. A man may do, or take the benefit of, wrong without malice or responsibility, but if, after learning the evil consequences to others, he insists upon retaining the benefit to himself, though no more than is strictly due to him, there is a principle, that the innocency goes out of his case, and he is held to have adopted the wrong.

Atlantic Mills vs. Indian Orchard Mills, 147 Mass. 268.

From the hour this mortgage was made, and because of it, the representations on which the money of the creditors was obtained were false, and false through a fact which the law prohibits. The creditors did not know of the mortgage, and had every right to believe that such a mortgage could not, and did not, exist

The mortgagees knew from inference, were bound to know in law, and did know in fact, that the mortgage was too large, and, for that reason, violated the law. All the money the creditors lost, the mortgagees got the benefit of, for the sole reason that the mortgage was unlawful; and they know that, too, now, but still insist upon it. The influence which knowledge of the violation should exert, is expressly reserved in the leading Iowa case (*Humphrey vs. Patrons' Mercantile Ass'n*, 50 Iowa, 607-12), and is not denied in the other Iowa cases. It is submitted that the authorities show that, when such knowledge necessarily appears upon the face of the instrument, when compared with the statutes, it should control the equity.

Mon. Nat'l Bank vs. Globe Works, 101 Mass. 58.
Beach on Pri. Corp., sec. 740.
Claflin vs. Far. & Cit. Bank, 25 N. Y. 293-8.
Com. vs. Smith, 10 Allen, 458.
5 Thompson on Corp., sec. 6009.
Green's Brice's Ultra Vires, page 40, note a.
4 Thompson on Corp., sec. 5705.
Board of Com. vs. Potter, 142 U. S. 355.
Durkee vs. People (Illinois), 40 N. E. R. 629.

It is sometimes said that when one of two parties, equally innocent, must suffer from the wrongs of a third, it must be borne by the one who unconsciously enabled the doer of the wrong to commit it; but it has never been said that, if the offence was a violation of law, and one of the parties was a *particeps criminis*, equity would interfere to give to him a preference, and throw the whole loss on the other man.

This mortgage was, *ipso facto*, a fraud upon every noteholder, no matter whether he got his note before or after the mortgage. Every noteholder took his note under an implied warranty that the indebtedness of the company was, and would remain, within the limits of law. Each note was small in amount, and carried no information of other debts. This warranty, as to the company, becomes, under the authorities, a conclusive presumption—in this case, at least, a controlling presumption. Each noteholder was entitled to conclude his loan on the presumption, and warranty, involved in every note deal, that the lawful limit had not been exceeded. Each note sale, or loan, carries this representation—this implied warranty. The assumed integrity of each note transaction forces this presumption. To get money on these notes was fraudulent. Why? Because the money was secured with absolute knowledge of such inability to pay as to amount to an intention not to pay them. The legal limit of indebtedness always leaves one-third of the assets for gen-

eral creditors. This unlawful mortgage left nothing. Creditors may loan to a company relying on the company keeping its indebtedness within the lawful amount, and feel and be safe without security. The credit is based on the law. But a creditor comes along who knowingly violates the law and takes a mortgage too large by half. His wrong-doing is rewarded as diligence and the creditor that relied on the law gets nothing. It's all wrong, and we don't believe the courts of the land will thus teach the people how to break and evade the law.

Did the bondholders become parties to this fraud? Yes. They knew that every creditor had a right to rely on the implied warranty that the legal limit of indebtedness had not been exceeded. The assets of such a corporation are presumed to arise from a sale of its stock, which in this case brought nothing. A million dollars of stock should mean a million dollars of property. To put a million and a quarter mortgage on this property assures insolvency, and changes the legal presumption that the limit has not been exceeded into a legal fraud, and in this case, necessarily involving every noteholder in total loss. The bondholders, by a known, illegal transaction, are participants in this fraud. They are guilty of using the presumption that the limit has not been exceeded, as a trap to ensnare others for their own gain. The bondholders have but one reply to this actual fraud, namely, that their mortgage is recorded, and that we are presumed to have contracted with constructive notice. Constructive notice of unlawful indebtedness cannot be given under the recording act. The most that could be charged is knowledge up to the lawful limit. In so far as the mortgage is unlawful, its record imparts no constructive notice. In this sense, each noteholder is innocent, and each bondholder has perpetrated a fraud upon him to his injury. Upon whom will equity inflict this loss?

Reese on Ultra Vires, sec. 61.

It was urged by the bondholders that they were more careful to take security than were the creditors, and that their diligence should be protected. It is true that one of the maxims in equity is, that it protects the diligent; but diligence is the one truthful compliment that may always be paid to a wrong doer. The Court must know what the suitor was doing before it rewards his diligence.

In cases of railroad foreclosure, analagous to this, the six months' rule gives priority of lien to indebtedness contracted within that time, for certain purposes, and there is practically no limit to the priority which may be given to construction claims. This relief is administered by courts of equity by main strength, and as a function of their equity powers.

The maxim in equity, that "he who seeks equity must do equity," is a compromise between the parties enforced by the conscience of the Court. It is the same rule in equity as is another in civil polity, "that the rights of every man end where the rights of any other man begin."

There are twelve maxims in equity. Six of them are applicable to this case, and some of them point directly to the compromise or decree herein proposed. One we have already considered.

Its immediate successor is "he who comes into equity must come with clean hands." This also refers to the complainant, only; the defendant need not have clean hands. All illegality falls within this maxim, and is unclean.

Reese on Ultra Vires, sec. 69.

> "The principle is thus applied in the same manner when the illegality is merely *malum prohibitum*."
>
> *1 Pomeroy, sec. 402, 1st Ed.*

> "Equity will never assist a party to carry into effect his own intentional violation of law."
>
> *Ibid, sec. 937.*

It is admitted that United States courts have somewhat relaxed these rules in national bank cases. But, in all such cases, the rule is only relaxed as between parties whose hands are equally unclean.

On this maxim, and where the evil is prohibited by a statute of general application, equity should neither assist the defendant Terminal Company in repudiating the contract, nor the mortgagee in enforcing it; but, in the case at bar, should protect the judgment creditor, for not only is his hand the most generous and equitable, but it is the only clean one in the case.

But if the equities of the mortgagee and the judgment creditor were equal, the latter should prevail under another maxim: "Where there is equal equity the law must prevail."

The best title in the world is title by creation. The moneys of bondholders and noteholders, alike, created the assets. In that they stand alike.

The estate is insolvent, and in such case equity disposes of the fund on the theory that the contributors should be the distributees pro rata. Both of the liens in this case rest on that same equity, but the lien of the judgment creditor is both legal and equitable, and that of the bondholder is, at best, equitable only.

This includes another maxim of narrower operation: "Equity follows the law," which means that it is bound to obey the law, and as well that it observes its principles.

And again, and directly controlling, "Equality is equity." This is one of the greatest of the maxims, the universal guide in insolvencies and the distribution of funds, when the Court is not restrained by absolute legal priorities.

The last of the maxims is the one which, though not referred to, must have been in the mind of the Court of Appeals when it rested its judgment on the consciences of the parties, rather than *in rem* either against the statute to destroy it,

or, in behalf of the contract, to sustain it: "Equity acts *in personam* and not *in rem*."

Not only one, but all, of these maxims this judgment creditor asks leave to stand by the side of the alleged mortgagee and invoke.

While neither of these parties thought that the enforcement of his claim would inflict loss upon anybody else, it is a fact that the enforcement of either in priority would do so. The mortgagee's claim is illegal, but the judgment creditor asks for no more than he concedes.

This offer changes the aspect of the case. There is no longer a controversy for an exclusive priority in $1,250,000 of property, but only of the right of the judgment creditor to preserve an interest in one-third of it; and he submits that the bondholders' equities, as against him, are satisfied.

In the fifth division of its opinion, pages 40-1 of the petition for certiorari, the Court of Appeals says:

> "In April, 1893, the Terminal Company made a trust deed of all its property to the Union Loan & Trust Company to secure the payment of these notes. This deed recited that it was subject to the mortgage in suit."

The status of this mortgage should be shown. It is set out on pages 15–18 of the record. There is no evidence fixing the exact time when this so-called second mortgage was taken by the Union Loan & Trust Company. The mortgage itself purports to have been signed and acknowledged on the 24th day of April, 1893, the very day the Union Loan & Trust Company voted to make its assignment for the benefit of creditors, which it actually did on April 25, 1893. The mortgage was not made to secure any of the Terminal notes that had been negotiated through said Trust Company and that make up the notes represented by the Credits Commutation Company, petitioner herein (Transcript, pp. 78–82), nor the notes mentioned in the stipulation of the parties (Transcript,

pp. 243–4), but said mortgage purports to secure 190 other notes *of even date therewith*, aggregating $750,000. No such notes were ever negotiated. None of the notes in controversy bear even date with the mortgage, but a much earlier date.

The interests represented by the petitioners do not rest in any manner upon said alleged mortgage, nor can said alleged mortgage conclude nor preclude the petitioners from any of their rights under the issues in this case.

The first twenty-four pages of the printed record refer to an old suit brought by only a half dozen banks for the foreclosure of said alleged mortgage, and the very most that can be gotten out of that mortgage is a prejudice, if any, to the notes represented by such banks. If all of those notes should be held to be prejudiced by said procedure it would reduce the indebtedness of the Credits Commutation Company by only a few thousand dollars, if indeed any of said notes should be shown to be therein included. As that is the most and the worst that can be urged against this petitioner creditor because of the alleged second mortgage, its concession, if necessary, leaves our rights intact and the amount of the claim of the judgment creditor practically unchanged. The Court of Appeals speaks, in said fifth division, of determining the "rights of the owners of these notes under their second mortgage of April, 1893." But no such rights are asserted, and, with the exception of the first suit on the part of said six banks, no rights have been asserted under either said mortgage or said notes, and the court in making the statement that any rights thereunder were before it for adjudication lost sight of the issues, for neither the mortgage nor the notes thereby secured are in any manner presented for determination. The old suit by said six banks was long since abandoned. Entirely different notes are involved, and in no manner do they rest, nor is it claimed that they rest, upon

the second mortgage, nor is there any testimony that the second mortgage was made for their benefit, nor that the noteholders in question ever knew of or accepted the same. The allegations of the petition of those six banks is all that there is in this case touching this matter, and that petition was never introduced in evidence and cannot prejudice the petitioner creditor. For what purpose the second mortgage, referred to in the Court of Appeals, and evidently wholly misunderstood, was executed and delivered, if any delivery was made, is not shown. Even if it was formally handed into the Trust Company on the day before its failure and on the very day it voted to assign, it cannot be held to prejudice the rights of creditors who neither knew anything of it nor will have anything to do with it. Under the evidence, the first mortgage bonds should have been with the Union Loan & Trust Company as collateral security to petitioner's notes. All of such bonds after signature were there as such security but when sent to respondent for certification were never returned to the Union Loan & Trust Company as they should have been in pledge for said notes. They were wrongfully extracted by the collusion of two of the officers of the Trust Company and sold and the proceeds diverted to uses other than the payment of the notes to which they had been pledged.

Another matter should be here stated. On pages 62 and 243 of the record is a stipulation made to avoid the necessity of the taking of evidence to sustain the facts therein stipulated, to the effect that the promissory notes represented by the petitioner herein, Credits Commutation Company, "are outstanding, due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company." Since this stipulation was intended to and did do away with the taking of evidence to show the validity of petitioner's notes, it is urged that full force be given to this stipulation of their validity, even

though said construction may make against the validity of the bonds. In view of the evidence (pages 120-1-2) and this stipulation (pages 243-4), the petitioner protests against the construction of the Court of Appeals in not making its entire indebtedness renewals of the original notes antedating respondent's bonds and mortgage.

VII.

THE TERMINAL COMPANY IS A QUASI PUBLIC CORPORATION ORGANIZED UNDER CHAPTER 139 OF THE ACTS OF THE TWENTIETH GENERAL ASSEMBLY OF IOWA AND HAS NO AUTHORITY TO MORTGAGE ITS PROPERTY, AS NO SUCH AUTHORITY IS GRANTED.

We allege "that under the laws of Iowa said corporation, the Terminal Company, is not authorized to mortgage its property or franchises or after-acquired property nor do its articles purport to grant power to mortgage its franchises." (Transcript, pp. 66, 73.)

Article 3, page 189, reads:

> "This company shall have power to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side-tracks, depots, yards, warehouses, storage-houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes and side-tracks, wood and water stations, and to hold, use and control over same, and shall have power to construct, operate and control one or more lines of railway, from the depots and yards of the said company in Sioux City, one to run in an easterly direction to the east line of Woodbury county, Iowa, one to run in a westerly direction to the Big Sioux River, and one to run in a northerly direction to the Iowa state line. And shall have power to lease grounds and buildings, and to purchase and hold all needed improvements for the

use and purpose of said company, and to mortgage, lease or sell the said grounds and improvements thereon."

It is well settled that by reason of the public duties and character of a railway company, such corporation "cannot make a valid mortgage of its property without the consent of the State, for by foreclosure of the mortgage, the corporation would become disabled from performing its duties to the public."

2 Morawetz on Corporations, sec. 1120.

5 Thompson on Corporations, secs. 6137, 6131.

"The same rule undoubtedly applies to any other company which has been empowered by the State to establish its works through exercise of the right of eminent domain, or which has received State aid in its enterprise in any other form."

2 Morawetz on Corporations, sec. 1120.

Reese on Ultra Vires, sec. 140.

The court will notice that this Terminal Company has the right of eminent domain by its articles, whether a railway in the full sense, or whether only a union depot company under the provisions of the Acts of the Twentieth General Assembly, Chap. 139, and its powers of eminent domain are in the charter stated in the words of this Act.

Therefore, under the last quotation from Morawetz, the Terminal Company comes within the rule and cannot make a valid mortgage of its property without the consent of the State, because of the public duties it owes to the State.

The Union Railway Depot law was passed in 1884 and is as follows:

"In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, au-

thority is hereby given to any number of persons or any number of railway corporations or both persons and railway corporations, to form themselves into a body corporate under the general incorporation laws of this State relating to corporations for pecuniary profit for the purpose of acquiring, establishing, constructing and maintaining at any place in this State union station houses or depots for freight or passengers or for both, with necessary offices for express, baggage, and postal rooms in the same or separate buildings, railroad tracks and other appurtenances of such depots. And for that purpose may make and file for record articles of association in the manner provided for such corporations in this State, and any railroad company operating a road in this State or interested in the operation of a road in this State, whether organized under the laws of this State or elsewhere, may become stockholder in such corporation in the same manner an individual might. Such articles may provide for the business of the corporation being conducted under by-laws to be adopted by the stockholders, in which case a copy of such by-laws shall be posted in the passenger or waiting rooms of the depot and in the office of the company."

"Sec. 2. Every corporation formed under the provisions of this act, shall have power to take and hold for the purposes mentioned in section 1, such real estate as may be deemed necessary by the railroad commissioners for the location, erection and construction of their depot and its approaches, which they may acquire by purchase or by condemnation as provided by chapter 4, title 10, Code of Iowa, 1873, and when condemned and paid for as thereby provided such real estate shall belong to the corporation."

"Sec. 3. Such corporation with the consent of the city council of any city or town in this State in which said depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot upon the streets or alleys of said city, and by and with the consent of such city council may erect such depot upon or across any such street or alley, but no railroad track can thus be located, nor can such depot be so erected un-

> til after due injury to property abutting upon the streets or alleys upon which such railway track is proposed to be located or such depot is proposed to be erected, has been ascertained and compensation made in the manner provided for taking private property for works of internal improvement in chapter 4 of tile 10 of the code, subject to the provisions of section 464 of the code."

This is the law, Chapter 139, Acts 20th General Assembly, under which the Terminal Company was organized. The title of the law is "Union Railway Depot; An Act for Union Railway Depot." No where is any authority given to such a company to mortgage its property. In the second section above quoted, it became necessary to affirmatively incorporate a provision for condemnation in behalf of union railway depot companies in order that they might secure the desired location. This right of condemnation thus incorporated into the union railway depot law is the same right of condemnation that belongs, in a more limited degree, to railroads proper, so that in order to give such companies the right of condemnation, it was necessary to enact that section, and had it been the intention or purpose of the legislature to give union railway depot companies the right of mortgaging their property, such a provision would also have been incorporated in the union railway depot law.

As to the Terminal Company, the words of Morawetz, in section 1120, apply, to-wit:

> "The same rule undoubtedly applies to any other company which has been empowered by the state to establish its works through the exercise of the right of eminent domain."

The Terminal Company has, by its charter and by the statute, the right to establish itself by eminent domain. Therefore, the Terminal Company has no authority to mortgage unless given by the legislature.

The reason for this strict rule, making such corporations

as the Terminal Company an exception in their power to mortgage, is due to the policy and determination of the state to withhold from them the exercise of powers which would result in their insolvency or in their incapacity to render the required public service.

Union depot railway companies were authorized by the legislature for reasons of greater convenience and safety to the public in the way of passenger and freight terminal facilities. The entrance of a railway into a city is always costly and dangerous to human life. In a crowded community railways are necessary evils and are to be limited in number whenever possible, and the public is therefore deeply concerned in having railway terminals so arranged as to accommodate permanently and safely many lines of railway. If the power to mortgage were vested in such companies the public would be subjected to the danger of having them wiped out of existence by foreclosure proceedings and their property and franchises diverted to other uses. A mortgage can easily be made a weapon of exclusion. Further, railway companies would not abandon their individual depots to enter a union depot except under the assurance that they would not be subject to the peril of defaulted mortgages. It is probable that the legislature considered a denial of the power to mortgage the surest safeguard against the contingency of such a company being incapacitated by its insolvency from rendering the intended service to the public. It will be presumed that the legislature designedly withheld the power to mortgage, especially as under the law such power is not implied in *quasi* public corporations of that character.

The Court of Appeals says:

> "But this (the Terminal Company) was not a corporation organized for the sole purpose of constructing union depots. On the other hand, the description

> of the general nature of its business in its articles of corporation makes no reference to any union depot, and expressly states that its business is, among other things, to construct and operate one or more lines of railway."

The Court, a little further on, says:

> "All doubt of the power of the Terminal Company to make this mortgage is, however, dispelled by the provisions of sections 1955, 1965 and 1966 of McClain's Annotated Code."

While the Terminal Company has, in its enumeration of powers, the right to construct and operate railroads as well as to construct depots and terminal facilities, it remains undisputed in the evidence that the Terminal Company has not built a railroad, nor has it attempted so to do, nor does it own a dollar's worth of railway property, unless the Court shall find that the union depot with its thirteen miles of trackage for terminal purposes, located within the city limits of Sioux City, and manifestly built under the union depot law, is a railroad. This, we apprehend, cannot be done, for the authority to construct depots with their terminal facilities, rests wholly on Chapter 139 of the Acts of the 20th General Assembly, and the Terminal Company is not "any such company" as McClain's Code (sections 1955, 1965-6) refers to in giving railways the power to mortgage.

The conclusion under which the Court of Appeals satisfies itself of the authority of the Terminal Company to mortgage, rests upon the proposition that the Terminal Company has authority to mortgage its terminal property under whatever authority it may have to mortgage its railway property if it should have any railway property to mortgage. But the Terminal Company has no railway property and the mortgage simply covers its terminal system within the corporate limits of Sioux City.

The Court of Appeals cites *Thompson vs. Lambert*, 44

Iowa, 239, 243, as sustaining the Terminal mortgage, under the idea that the powers of a corporation are as broad and comprehensive as those of an individual unless the exercise of the assumed power is expressly prohibited. This case also refers to the case of *Railway vs. Howard*, 7 Wall. 412.

The Terminal Company erected its union depot and tracks, or terminal facilities, entirely within the city limits, and in part upon its streets and alleys, under the Union Depot Act. Except for that law, which gives the power of eminent domain, the Terminal Company could not have acquired property in the heart of the city. An individual could not have built the terminal system. To acquire and develop such property the right of eminent domain was thereby given, *but only to corporations.*

The case of Railway vs. Howard, *supra*, did not contest a mortgage; and it is the power to mortgage that is disputed.

The case of Thompson vs. Lambert, *supra*, did involve a mortgage, but the mortgagor corporation therein was not a *quasi* public corporation, as is the Terminal Company. The Terminal Company, in receiving the power of eminent domain from the state, owes peculiar and important duties to the state, one of which is to continue solvent, an essential to its continued existence and service to the sovereign. This is a distinguishing fact not to be lost sight of in the determination of the authority to mortgage and especially to make this self-destructive mortgage. We understand that corporate leases have been held by this court *ultra vires* of the corporation because they merely temporarily disable the corporation from its service to the public.

The power to mortgage should not be construed into the Iowa statute (McClain, sec. 1609), as did the Court of Appeals. The fact that the state, as to railways proper only, saw fit, after the passage of the foregoing general provision,

to pass sections 1965, 1966 ~~and 1967~~ (McClain), giving to them the right to mortgage, also to enact Chapter 139 of the 20th General Assembly, and Chapter 26 of the 25th General Assembly, indicates a construction by the legislature that the general provisions did not theretofore contain the exceptional power to mortgage.

The court will note the fact that the right to mortgage either franchises or after-acquired property is not claimed under the articles of incorporation (Transcript, pp. 189–90). The mortgage (pp. 142–3) recites that these bonds are issued, among other things, to "purchase necessary grounds" for its railways and terminal facilities. It has purchased none for its railways, but has for its terminal facilities, and for union depot purposes.

The sections of McClain's Code (1965-6) relied on by the Court of Appeals, state that "any SUCH corporation shall have the power to issue its bonds," and secure the same by mortgage, but the corporations to which the word "such" refers are ordinary railways, clearly so under the context. Moreover, such power to mortgage is given "for the construction and equipment of its railway" (McClain's Code, sec. 1965), and does not in terms permit a mortgage for the acquisition of lands, and Chapter 26 of the 25th General Assembly (1894), enacted four years after the execution of the mortgage in controversy, seemed necessary in the mind of the legislature to authorize a railway corporation "to mortgage its property and franchises, in whole or in part, to secure bonds issued by it to refund or pay indebtedness, or to improve and develop its property, or for the purpose of effecting ing the object of its incorporation." A terminal company must have extensive grounds while an ordinary railroad company merely takes an easement or right of way, so that even if the statute should be sufficient for the latter it is not so for the former. It is to be presumed that the legislature

enacted these specific acts because they were deemed necessary, and they support legislative construction of the general provision as not impliedly (as it does not expressly) containing the power to mortgage. If there is a distinction between the *acquisition* of the terminal grounds, which cost a million dollars, and the *construction* of the depots and terminal facilities thereon, which cost hardly a third of that amount, none of these acts are sufficient in their language to authorize the mortgage to purchase grounds, which is a main purpose of the mortgage as therein recited. In any event, if the construction of the Court of Appeals is correct, these subsequent acts were wholly unnecessary, because included in the general statute (McClain's Code, sec. 1609), which reads, "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy." If these subsequent acts were necessary, then the construction of the Court of Appeals is wrong The fact that the legislature enacted them is proof that it did not construe the general provision as giving the power to mortgage.

The question here presented, however, is broader than the giving of a mere mortgage. Mortgages upon some parts of its property might be in furtherance of the purposes of the Terminal Company and its continued service to the state, but the mortgage here assailed is a mortgage of everything, property, rights, franchises and all. It leaves nothing. No lease ever more completely disabled a corporation from serving the state. The fact that a lease operates more quickly in disabling a corporation than does a mortgage should not change the rule of law, for it does not change the reason on which the law rests. The lease leaves something after its expiration, but this mortgage is certain and complete abdication. Powers in aid of the corporation may be implied but a power that leads only to self-destruction is not impli-

edly nor expressly given to the Terminal Company. This mortgage by a *quasi* public corporation is both unlawful and against public policy.

The Terminal Company has its charter from the State for the "public convenience and safety," and the due performance of its functions being the consideration for the rights so granted by the State, any contract which disables the corporation from performing them, or which undertakes, directly or indirectly, mediately or immediately, without the consent of the State, to transfer such rights and powers, is void as against public policy. The right to mortgage on the part of a *quasi* public corporation without statutory authority comes under the same rule and the same law as the right to lease. This mortgage, and especially paragraph 6 (Transcript, pp. 149-50), contains provisions that for even slight neglect or default the Terminal Company may not only be disabled but ousted. It contracts to surrender the Terminal Company, body and soul, and everything it has or may have, of every kind and nature, on slight neglect or default, to the Trust Company, a foreign corporation. Public policy does not sanction and the law should not sustain this. The cases that have reached the Supreme Court on *ultra vires* contracts have been mainly leases, but the law against this mortgage must be the same law. The Supreme Court has said that it should not be understood as holding that in a clear case of the exercise of a power contrary to public policy, a railroad company would be estopped to decline to be bound by its own act, even when fulfilled by the other party to the contract.

We submit several recent cases in this court which seem to us sufficient, under the broad doctrine of *ultra vires* and public policy, to destroy this mortgage.

Central Transp. Co. vs. Pullman's Palace Car Co., 139 U. S. 24.

Jacksonville M. & P. Ry. & Nav. Co. vs. Hooper, 160 U. S. 514.

Union Pac. Ry. Co. vs. C. M. & St. P. Ry. Co., 163 U. S. 564.

St. Louis, V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S. 393.

Oregon R. & Nav. Co. vs. Oregonian Ry. Co., 130 U. S. 1.

Penn. Ry. Co. vs. St. L., A. & T. H. R. Co., 118 U. S. 290.

Thomas vs. Railroad, 101 U. S. 71.

VIII.

RESPONDENT'S REMEDY IS TO DISAFFIRM THE CONTRACTS AND BRING AN ACTION ON QUANTUM MERUIT.

Contracts *ultra vires* of strictly private corporations are enforced on the contracts. Contracts *ultra vires* of strictly public corporations are not enforced either on the contract or on the *quantum meruit*. What the rule is as to contracts *ultra vires* of *quasi* public corporations may still be in doubt, but we submit that relief should be given, if at all, only by a disaffirmance of the unlawful contract, leaving to the party his action on *quantum meruit*. This court may well review this case and declare the law for *quasi* public corporations, a class of corporations which are constantly gaining in strength and number and which vitally affect the interests of the people. They must frequently come into conflict with public rights and public policy and the status of their unlawful contracts and of parties under them should be definitely determined. We have insisted that respondent could get nothing from a court of equity as upon its unlawful contract but that it must recover, if at all, in an action on *quantum meruit*.

This case in itself is important. Measured by the average product of men's lives, it is, in the amount involved, even vast. No court of national jurisdiction, if limited to cases

involving this sum or over, would be crowded if it heard them all. The amount involved was the statutory test prior to the Court of Appeals Act, and presumably the discretion left in this court by that act contemplated some regard for like considerations. The Circuit Court and the Court of Appeals have not decided the case for the same reasons nor upon the same basis. The Circuit Court defeated the petitioner on a statutory construction, which seems to have been rejected by the Court of Appeals. The petitioner is a judgment creditor, with his indebtedness both admitted and established; indeed, is the only *bona fide* creditor of the Terminal Company. The bondholders under their deliberately unlawful transactions cannot be considered *bona fide* creditors. The bonds were knowingly executed and taken with the deliberate purpose of violating the laws of Iowa. The bondholders get nothing in this suit save from the bounty of equity, and yet such unlawful creditors, in the bounty of equity, take everything, and leave nothing for the *bona fide* creditors. It is not written that the mortgagor can forgive the violation of law. Of what use is law? A court of equity must ever remain a court of quick conscience, as ready to smite as to succor, and equally ready to refuse relief, when to give it, would be to let the wrong-doer profit by his wrong. Creditors who participated in the violation of law have not only been given the full benefits of their unlawful act, but have absolutely displaced *bona fide* creditors. The power of this court to review may well be generously exercised.

Respectfully submitted,

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IOWA STATUTES REFERRED TO IN BRIEF.

MCCLAIN'S CODE OF IOWA.

Section 1611 is set out in full on pages 4–5 of petition.

Chapter 139 of the 20th General Assembly is set out on pages 38–40 of brief.

~~Chapter~~ See 1955: "Any corporation organized under the laws of this state for the purpose of constructing and operating a railway, may, with the assent of two-thirds of all the stockholders in interest, change the corporate name thereof. * * "

The following intervening sections refer to powers and duties of railways proper in reference to transportation of freight and passengers in the state and jointly with railroads outside the state and the public reports to state officers, etc.

SECTION 1965: "Any such corporation shall have power to issue its bonds for the construction and equipment of its railway. * * * Such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises."

SECTION 1966: "Said mortgages or deeds of trust, may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof."

SECTION 1609: "Among the powers of such body corporate are the following:

To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy."

Chapter 26 of the 25th General Assembly is as follows: "An act authorizing railway corporations to mortgage their property for certain purposes:

Be it enacted by the General Assembly of the State of Iowa, as follows:

SECTION 1. That any railway corporation organized under the laws of this state is hereby authorized to mortgage its property and franchises, in whole or in part, to secure bonds issued by it to refund or pay its indebtedness, or to improve and develop its property, or for the purpose of effecting the object of its incorporation. * * *

Approved April 24th, 1894."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 192.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

STATEMENT OF THE CASE.

This case belongs to the class of cases in which the decree of the Circuit Court of Appeals is made final by statute and is brought to this Court by certiorari, and is now pending before this Court as if on appeal.

The Sioux City Terminal Railroad & Warehouse Company, called herein the Terminal Company, is an Iowa corporation, organized September 16, 1889. It purchased grounds for terminal facilities prior to January 1, 1890, and a portion of the same thereafter, and proceeded at or about said date to prepare said grounds for the laying of terminal tracks, and later, in 1892-3, built thereon its union depot.

Prior to January 1, 1890, the Terminal Company had executed its separate notes in the sum of $5,000 each, which were deposited with and negotiated by and under the endorsement of the Union Loan & Trust Company, of Sioux City, Iowa, note by note, to different banks and bankers throughout the country, mainly in the Eastern States, and for its endorsement and negotiation the said Trust Company received a small commission. The proceeds of these notes purchased the property of said Terminal Company, there being no cash received upon its stock, the entire authorized issue of which, $1,000,000, par value, was finally given to the Sioux City & Northern Railroad for the control of a few nominal franchises or rights of way upon certain streets and alleys, having no substantial value, but serving as a subterfuge under which to "issue" the Terminal stock.

The aggregate indebtedness represented by these different $5,000 notes, so negotiated to various and different parties throughout the country, was, on January 1, 1890, about $1,250,000. This amount was at different times more or less reduced, but the larger part of it, by renewals and substitutions, continued in the same form of these six months $5,000 notes until, at the time of the failure of the said Union Loan & Trust Company, which had negotiated the same under its endorsement and of which Appellant E. H. Hubbard became assignee for the benefit of creditors on the 25th day of April, 1893, there was outstanding of these $5,000 notes the aggregate sum of $718,000. In reference to this note indebtedness, it is stipulated (Record, pp. 243-4) by the parties to this suit "that there are outstanding, due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company negotiated through the Union Loan & Trust Company under its en-

dorsement to the amount of $718,000," and in said stipulation these are further described as the notes to which reference will constantly be made in this brief, and including as a part thereof the notes purchased and herein represented by the Appellant Credits Commutation Company, which subsequently to 1893 became the owner of $616,500 principal of said outstanding notes, and on July 23, 1895, reduced the same to judgment against said Terminal Company for the amount of said principal, $616,500, and interest, $75,596.95, on which general execution was at once issued and returned wholly unsatisfied. Whereupon said Credits Commutation Company, judgment creditor, one of the appellants herein, intervened by express permission of Court in this suit which had been commenced in the preceding year, but which had not gone to decree.

The first twenty-four pages of the record herein have nothing to do with the issues on which this case was tried, and on which it is now presented. That attempted foreclosure in behalf of half dozen notes was immediately abandoned. The pleadings under which the issues presented to this Court were made, commence on page 25 of the record.

This suit, on the issues here presented, was independently brought by the Trust Company of North America to foreclose an alleged first mortgage executed by the Terminal Company upon all its properties, rights and franchises, dated January 1, 1890, and purporting to secure 1,250 bonds of the amount of $1,000 each, par value, of said Terminal Company, which bonds, to the amount of $1,000,000 were negotiated for substantial value in July, 1890, and the remaining $250,000 thereof were not sold until the summer of 1893, prior to which latter date the identical notes represented herein by Appellant

Credits Commutation Company, judgment creditor, were all actually outstanding.

The Terminal Company got the benefit of the proceeds of appellant's notes. Indeed, the proceeds of the earlier notes, herein retained by renewals and substitutions, purchased substantially all the property covered by the mortgage in controversy.

The negotiation of the notes took place in single transactions with separate parties, each note for $5,000, making no disclosure upon its face or otherwise of other notes or other indebtedness, and the validity of this indebtedness of appellant is admitted by stipulation in the record. (Record, pp. 243-4.)

Each mortgage bond (Record, p. 144), however, referred to the mortgage in controversy, and upon its face disclosed the fact that each bond was a part of an indebtedness aggregating $1,250,000, as a single transaction. The mortgage in suit also fixes the issue at the same amount. (Record, p. 143.)

The authorized capital stock of this Terminal Company was only $1,000,000, and the company was permitted (Record, p. 190) to commence business when only $200,000 of said capital stock had been subscribed. Only this last amount had been subscribed or issued at the date of the bonds and mortgage.

The charter of the said Terminal Company provided (Record, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

The statute law of Iowa, Sec. 1611 of McClain's Code of Iowa, originally read thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

Chapter 22 of the laws of the 20th General Assembly, 1884, added the following proviso:

> "Provided, that the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile, single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

In 1886, Chapter 54 of the laws of the 21st General Assembly, made this further addition or second proviso, to-wit:

> "Provided, further, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of such debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

The Appellant Credits Commutation Company, judgment creditor, with the validity of its indebtedness admitted by adjudication and under stipulation in this suit, defends against the foreclosure of said mortgage,

and the establishment of the indebtedness purporting to be represented by the bonds securing the same, on several grounds, one of which is that the execution of said bonds and said mortgage and the incurring of said lump indebtedness of $1,250,000 in a single transaction were ultra vires and unlawful, because prohibited by the charter and also prohibited by the Iowa statute. The Terminal Company and other appellants make the same defense.

On the 23d day of December, 1893, the Terminal Company executed a trust deed (Record, pp. 233–242) to Appellant E. H. Hubbard, trustee, to secure the said notes of the said Terminal Company so outstanding under the endorsement of said Union Loan & Trust Company in the aggregate amount of $718,000, of which amount $616,500 are the identical notes represented herein by the Appellant Credits Commutation Company itself as judgment creditor. This trust deed is not subject to the alleged mortgage to the Trust Company of North America.

The Circuit Court on the hearing, in so far as the statements made at the time thereof may be used as a criterion, seemed to favor the contention of these appellants, but in the decision of that Court, the mortgage and bonds in controversy were sustained under a construction of the statute of Iowa (69 Fed. Rep., 441), applying to said bonds and mortgage the second proviso above quoted, which construction has since met the express disapproval of the Supreme Court of Iowa (76 N. W. R., 688), and we are informed by appellee, will be expressly abandoned at this hearing.

The Circuit Court of Appeals (82 F. R., 124; Record, pp. 288-303), for the purpose of its decision, conceded that the bonds and mortgage did not fall within the

second proviso of the statute, and rested its decision upon an entirely different ground from that of the Circuit Court, to-wit: upon the ground that he who seeks equity must do equity, and, therefore, the mortgage and bonds in controversy could not be thus defended against while the proceeds are retained by the Terminal Company, and that neither Hubbard, trustee, nor the Credits Commutation Company, judgment creditor, had any better standing to assail the mortgage and bonds than had the Terminal Company itself.

SPECIFICATION OF ERRORS RELIED UPON.

The appellants severally and separately, each for himself, and not jointly with one another, assigned (pp. 272-280) and in this Court rely upon the following errors:

2. Because the Court erred in not decreeing that said trust deed purporting to be made by the said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America, dated January 1, 1890, and all the bonds purporting to be secured thereby were each and all null and void, for that (a) the indebtedness represented by said bonds and trust deed, as a single indebtedness disclosed upon the face of each bond, exceeded in amount two-thirds of the capital stock of said Sioux City Terminal Railroad and Warehouse Company; (b) The Articles of Incorporation and notice thereof of the said Sioux City Terminal Railroad and Warehouse Company expressly limit the indebtedness to two-thirds of the paid-up capital stock of said Sioux City Terminal Railroad and Warehouse Company; (c) at the time of the execution of said mortgage there was no paid-up capital stock and only two hundred thousand dollars par value of said stock subscribed; (d) the total authorized capital

stock of said company never exceeded one million dollars; (e) the laws of Iowa prohibit the incurring of so large an indebtedness by said Sioux City Terminal Railroad and Warehouse Company; (f) the pleadings in this case did not permit a recovery under any substituted equity but rest the recovery only upon the bonds and trust deed as contracts and as such they are invalid and void; (g) the said Trust Company of North America and each holder of said bonds from the first has had full knowledge and notice of the facts rendering the same ultra vires and void and were participants therein and acted in pari delicto.

3. Because the Court erred in decreeing that said alleged bonds were secured by a valid trust deed to the Trust Company of North America upon either the real estate, personal property or franchises of the said Sioux City Terminal Railroad and Warehouse Company.

4. Because the Court erred in not decreeing said bonds and trust deed from said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America invalid and void and of no force and effect and constituting no lien upon any of the properties, real estate or personal, of the said Sioux City Terminal Railroad and Warehouse Company.

15. Because the Court erred in decreeing that the Sioux City Terminal Railroad & Warehouse Company should, on or before the 1st day of December, 1895, pay into said Court or into the hands of the depositary to be named by said Court to the credit of this suit the full sum of one million two hundred fifty thousand dollars, with interest thereon at the rate of six per cent. from the 1st day of July, 1893, until the said payment is made for the use and benefit of all the holders of said bonds and coupons purporting to be issued under the said alleged trust deed of January 1, 1890.

16. Because the Court erred in decreeing that in default of such payment on or before the 1st day of December, 1895, the said Sioux City Terminal Railroad & Warehouse Company and all parties claiming under it since the execution of said trust deed of January 1, 1890, should be barred and foreclosed of all equity of redemption in said mortgaged premises, property, rights, assets, franchises, leases and contracts described or embraced in said alleged trust deed of January 1, 1890, and every part and parcel thereunder.

17. Because the Court erred in decreeing that in default of such payments on or before the 1st day of December, 1895, all of said mortgaged property should be sold, either as in said decree stated or otherwise.

23. Because the Court erred in decreeing that said bonds and coupons purporting to be secured by the said trust deed to the Trust Company of North America, were entitled to be paid out of the proceeds of the sale of said properties before any payments were made to these appellants or either of them.

24. Because the Court erred in decreeing that said bonds and coupons should be paid in full out of the proceeds of said sale.

25. Because the Court erred in decreeing that the said bonds purporting to be secured by said trust deed of January 1, 1890, to the Trust Company of North America, and overdue coupons belonging thereto, should be received by said master on account of amounts to be paid on the purchase of said mortgaged premises.

26. Because the Court erred in decreeing that the entire funds to arise from the sale of said premises after paying the costs of said suit and the expenses of said

administration of said estate and foreclosure as shown in Division 1 of paragraph 7 of said decree, and depositing said eighty thousand dollars reserved to protect said mechanic's liens, should be applied by the master to the payment of all of said bonds and unpaid coupons thereon, with interest accruing thereon and to accrue thereon, in full or ratably if said funds should not be sufficient to pay said bonds and coupons in full.

27. Because the Court erred in decreeing that in case said fund is not sufficient to pay the said bonds and coupons with interest in full, the said deficiency should be reported to said Court by said master, and thereupon the Trust Company of North America should recover from the Sioux City Terminal Railroad & Warehouse Company a judgment for the amount of such deficiency.

28. Because the Court erred in decreeing that said alleged bonds were all outstandig, due and unpaid, together with interest from July, 1, 1893.

33. Because the Court erred in not decreeing that the conveyance made by said Sioux City Terminal Railroad & Warehouse Company to said E. H. Hubbard, trustee, after re-entry by said company for breach of condition of lease of its property to the said Sioux City & Northern Railroad Company, be sustained as passing a free and unincumbered lien, title and possession of all and singular the property of said Sioux City Terminal Railroad & Warehouse Company to said Hubbard for the purposes as in said trust declared.

34. Because the Court erred in not giving the possession and the rents and profits of the property to E. H. Hubbard, trustee.

35. Because the Court erred in not decreeing the interest and lien of E. H. Hubbard, trustee, in and upon the properties of said Sioux City Terminal Railroad & Warehouse Company and the assets thereof, superior to the interest and lien of the said Trust Company of North America.

36. Because the Court erred in not decreeing the lien or claim of the Credits Commutation Company a first and paramount lien or claim on the property and assets of the said Sioux City Terminal Railroad & Warehouse Company, and to be first paid out of the proceeds thereof.

37. Because the Court erred in not decreeing the right, lien and interest of said Credits Commutation Company upon the property and assets of said Sioux City Terminal Railroad & Warehouse Company in priority of and superior to the lien, interest or right of the said Trust Company of North America.

38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, and Hubbard, trustee either or both, to share at least pro rata with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Railroad & Warehouse Company properties and assets.

39. Because the Court erred, even if priority should not be given to the claim of said Credits Commutation Company in the amounts of its said judgment as shown by the certified copy thereof offered in evidence and attached to its petition of intervention, in not decreeing that the properties, real, personal and mixed, of the said Sioux City Terminal Railroad & Warehouse Company, described in said trust deed to said Trust Company of North America, or otherwise, or the proceeds thereof, be held or applied for the use and benefit of the claim of

said Credits Commutation Company, or said Hubbard, trustee, either or both, in priority of the claim of said Trust Company of North America, or ratably with the claims of said Trust Company of North America, made in behalf of said alleged bonds, share and share alike.

BRIEF OF THE ARGUMENT.

The Mortgage to the Trust Company of North America and the Bonds Purporting To Be Thereby Secured Are Absolutely Void, for that upon Their Face They Are Both Ultra Vires the Corporation and Unlawful.

FIRST POINT.

THE BONDS AND MORTGAGE IN CONTROVERSY EVIDENCE AN INDEBTEDNESS WHICH IS PROHIBITED BY THE CHARTER OF THE TERMINAL COMPANY, AND, THEREFORE, SAID INDEBTEDNESS, AND THE BONDS AND MORTGAGE EVIDENCING THE SAME, ARE ULTRA VIRES THE CORPORATION AND ABSOLUTELY VOID.

Opposing counsel, in his brief resisting the petition for certiorari herein (p. 11), thus expressed his contention:

> "If, in the exercise of that act it (Terminal Co.) violated the laws of the state or its charter, its acts in that respect might be voidable, and whether or not they would be declared void would depend upon the equities of the case and whether or not justice could be done to all parties under such a holding."

At the outset, let us emphasize our contention that this was not an authorized contract performed in an unauthorized manner. It was incapable of authorization, offending alike against the charter and the statute to the equal knowledge of all parties and absolutely void.

The charter of the Terminal Company provided (Record, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." The words, "aside from the indebtedness secured by mortgage upon the real estate of the company," are unavailing to the appellee for any purpose in that in so far as it might be claimed that they permitted an increase of indebtedness beyond the two-thirds limit, they offend against the statute of Iowa, and, therefore, can have no force or effect. This provision of the charter had already exhausted the utmost statutory limit. While the language of the charter might have fixed the debt limit at less than the statutory limit, no charter can by any of its provisions increase the debt limit beyond the statutory limit. A corporation cannot enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its Articles of Incorporation.

5 Thompson on Corporations, Sec. 5996.

S. C. T. R. & W. Co. vs. Trust Co., 82 F. R., 133.

In express language, therefore, the Terminal charter absolutely prohibits the Terminal Company from incurring any indebtedness at any time in excess of two-thirds of the paid-up capital stock. Without at this time making distinction between "paid-up" and "authorized" capital stock, it is conceded that the charter of the Terminal Company authorized only one million dollars of capital stock, and two-thirds of this amount would represent the extreme limit of corporate power as applied to the incurring of indebtedness.

Each bond and the mortgage upon their face disclose, in a single transaction, the incurring of a lump in-

debtedness of $1,250,000, or twice as large as the corporation might lawfully incur. The Circuit Court of Appeals correctly found that appellee and the bondholders "had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being." These admitted facts would clearly seem to make this contract—these bonds and this mortgage—ultra vires the corporation. This is not a question of the irregular exercise of power, nor of the failure to make a contract in a prescribed way or under authorized or possible formalities; but the question here presented rests upon the absolute want of power in the corporation itself, no matter what form of procedure it might have taken to do the act. This contract, this single indebtedness, in and of itself violated and upon its very face disclosed the violation of the plain prohibition of the corporate charter. This contract involved the exercise of a power expressly excluded by the terms of the charter. The corporation could not make this contract at any time, nor under any circumstances or formalities, without violating the prohibition of its charter and assuming the exercise of a power expressly excluded under the very law of its being.

The Circuit Court of Appeals thought "the creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers." The contract, evidenced by this mortgage and these bonds, is not a misuse of legal power, nor the abuse of legal power, but an attempted exercise or usurpation of power not possessed, a power purposely and expressly excluded by a prohibition in the corporate charter. It is a contract that the corporation could not make at any time, nor under any circumstances, nor in any way, nor for any purpose—

a contract for which legal power never existed. The exercise of a prohibited power cannot be the excessive exercise of a power possessed.

The creation of this indebtedness of a million and a quarter dollars, as a single transaction, was certainly without the general scope of the corporate powers. These bonds were not within the general scope of corporate power because there were no legal formalities that the corporation could have complied with that would have made them valid.

> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with."

Cent. Transp. Co. vs. Pull. Car Co., 139 U. S., 24.

This contract contravenes, to the active knowledge and participation of all parties, not only public policy as expressed in statute law and the statute law itself, but also the prohibition of the charter, the very law of corporate being.

> "The law is the same whether the corporation is created by a special act of the legislature or under general laws by recording and filing the required Articles of Incorporation. Any person dealing with such a corporation is bound to take notice of the documents recorded or filed upon which as authorized and controlled by the general laws, depends the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation."

McCormick vs. Market Nat. Bk., 165 U. S., 550.

"This rule (that the lender may assume proper authority), however, does not apply where the power of the company itself as distinguished from that of its directors, is limited in point of amount; in such a case the lender is not entitled to assume that the prescribed amount is not being exceeded."

Robbins' Law of Mortgages, p. 474; citing cases.

"And if a limited power is conferred upon a society by its rules, the limits so prescribed ought not to be exceeded, and any borrowing in excess of the limits is wrongful (p. 711). The acts of the directors would in no way give effect to that which was unlawful, nor in my opinion would the assent of every shareholder to the transaction make it binding upon the society. * * * *

If in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness." (P. 713.)

Chapleo vs. Brunswick Bldg. Soc., 6 Q. B. D., 696.

"Persons dealing with a corporation having a limited power of borrowing are put upon inquiry whether that limit is being exceeded. They intended to do a thing which was against the law. It matters not that they did not appreciate the fact."

Ex parte Watson, 21 Q. B. D., 305-306.

The following authorities, among others, apply the doctrine of ultra vires to excessive indebtedness, and would seem to be directly in point.

Lady Wenlock vs. River D. Co., 10 App. Cas., 354.

Chapleo vs. Brunswick Bldg. Soc., 6 Q. B. D., 696, C. A. (705, 711, 713, 715).

Ex parte Watson, 21 Q. B. D., 301, 305, 306.

Robbins' Law of Mortgs., p. 474.

It should be stated that the case of Lady Wenlock vs. River Dee Co., 10 App. Cas., 354, is cited with ap-

proval in the discussion of the doctrine of ultra vires in California National Bank vs. Kennedy, 167 U. S., 368.

We also call the Court's attention to the fact that on p. 711, of the Chapleo case, supra, the leading English case of Ashbury Ry. Carriage Co. vs. Riche, L. R. 7, E. & I., 672 (approved in 101 U. S., 83 and 139 U. S., 24), is cited to sustain the doctrine of ultra vires for excessive indebtedness. It is thus shown by the highest English authority that contracts ultra vires by virtue of excessive indebtedness are subject to the same principles as contracts ultra vires for any other reason, and the distinction sought to be made by Judge Sanborn is without foundation. The same is true of the Wenlock case, supra, which expressly rests on the Ashbury and Great Eastern cases.

In McPherson vs. Foster Bros., 43 Ia., 48, that Court considered a somewhat similar provision, and said:

> "There is no distinction in reason between the cases of an entire absence of enactment conferring power and a prohibition of its exercise beyond a certain limit. They are in fact one and the same case. In the first instance power is not granted, and is not, therefore, possessed. In the other it is expressly withheld, and its exercise prohibited, and is, therefore, not conferred. There is in each case a total absence of authority. (P. 58.) When the limitation is passed there is the same absence of power as though none had ever been conferred. Otherwise the condition in limitation would be without effect. (P. 59.) Power is not only withheld, but a prohibition is placed upon its exercise." (P. 63.)
>
> "If the power conferred by a charter has been exhausted, then, in respect of any further exercise of it, the case stands as though it had never been granted."
>
> 5 Thomp. Com. Corp., Sec. 5982.

"Of course when a charter power is once exhausted it is, in respect to other contracts and rights, as though it had never been granted."

East Tenn. &c., R. Co., vs. Frazier, 139 U. S., 288.

The Minnesota Supreme Court, in Kraninger vs. Peoples Building Society, 61 N. W. R., 904, held, page 906:

"But there can be no distinction in principle between a case where the charter, or articles of association, prohibit a thing altogether, and where it is prohibited beyond a certain limit. In the one case, there is a total absence of authority to do the thing at all, and in the other, a total absence of authority to do it beyond a certain limit, and after that limit is reached there is as much an absence of authority in the latter case as there was in the former."

In Scovill vs. Thayer, 105 U. S., 143, this Court held that the stock issued by a corporation in excess of the limit fixed by its charter was ultra vires—absolutely void and without aid from the doctrine of estoppel—and that the parties could not thus "override the limitations and prohibitions of the charter." By analogy that case rules this case in favor of appellants.

See also Cook on Corp., 4th Ed., Sec. 292.

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction became absolutely void, could not be confirmed or ratified."

California Nat. Bk. vs. Kennedy, 167 U. S., 371.

"No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

California Nat. Bk. vs. Kennedy, 167 U. S., 368.

In Pullman Car Co. vs. Transportation Company, 171 U. S., 138, 149, this Court held a contract to be unlawful

and void "because it was beyond the powers conferred upon the Central Company by the legislature," which seems to mean that a contract ultra vires the corporation is for that reason unlawful.

In the same case, on pages 150, 151, this Court said:

> "The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in Holman vs. Johnson, 1 Cowper, 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

In cases of municipal indebtedness this Court has dealt with the question of the indebtedness exceeding a fixed statutory or constitutional limit, and has held excessive contracts for such indebtedness absolutely void, except where sustained under sufficient recitals, and no recitals can be sufficient which in themselves disclose that the transaction offends against the charter or statutory limit of indebtedness.

It is the settled law of this Court that a contract that is ultra vires the corporation is absolutely void, and will not be affirmatively enforced in equity as a contract. We need not inquire, under the state of the pleadings in this case, as to what might be the result of an action in the nature of a quantum meruit which would not affirm, but disaffirm the ultra vires contract, for it is enough to defeat

this suit in equity to establish the contract as ultra vires the corporation.

> "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the State Courts, in this Court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act. * * * No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. * * * * A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

Cal. Nat. Bk. vs. Kennedy, 167 U. S., 362.
Pull. Pal. Car Co. vs. Trans. Co., 171 U. S., 138.
McCormack vs. Market Nat. Bk., 165 U. S., 538.
U. P. R. Co. vs. C. R. I. & P. R. Co., 163 U. S., 564.
Jacksonville Ry. Co. vs. Hooper, 160 U. S., 514.
St. Louis V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.
Cent. Transp. Co. vs. Pul. Car Co., 139 U. S., 24.
Ry. Co. vs. Keokuk Bridge Co., 131 U. S., 371.
Oregon Ry. & Nav. Co. vs. O. Ry. Co., 130 U. S., 1.
Penn. Ry. Co. vs. St. Louis A. & Th. R. Co., 118 U. S., 290.
Thomas vs. Railroad Co., 101 U. S., 71.
Brunswick Gas. Co. vs. U. S. G. Co., 85 Me., 532.
Chewacla Lime Wks. vs. Dismukes, 87 Ala., 344.
Green Comp. Co. vs. Planters' P., 70 Miss., 669.
Davis vs. Old Col. Ry. Co., 131 Mass., 258, 270.
Nat. Tr. Co. vs. Miller, 33 N. J. Eq., 155.
Asbury Ry. Co. vs. Riche, 7 H. L., 653.
Atty. Gen. vs. Gt. E. Ry. Co., 5 App. Cas., 473.
Small et al. vs. Smith et al., 10 App. Cas., 119.

Trevor et al. vs. Whit. et al., 12 App. Cas., 409.
Ooregum Gold Co. vs. Roper (1892), A. C., 125.
Mann vs. Edinburg N. Tram. Co. (1893), A. C., 70.

SECOND POINT.

CONTRACTS THAT ARE ULTRA VIRES THE CORPORATION ARE FOR THAT REASON ALSO UNLAWFUL.

A contract that is ultra vires the corporation is for that reason unlawful, and such is the language of this Court in repeated decisions. Indeed, where the words ultra vires apply to an act beyond the power of the corporation itself in any manner, to perform, as determined by the provisions of its charter, they seem to be used interchangeably with the words "illegal" and "unlawful."

St. Louis V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

Such an ultra vires contract as that herein complained of does not bind either party, and neither party can maintain an action thereon at law or in equity against the other. The appellee herein seeks affirmative relief upon an ultra vires and unlawful contract, and it is settled that the affimative aid of a Court of equity cannot be invoked upon such contracts.

St. Louis V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 393.

We use the words ultra vires in the sense that the act complained of is not such as the corporation could perform, and such an act is not voidable only, but wholly void, and of no legal effect.

Cent. Transp. Co. vs. Pul. Car Co., 139 U. S., 24.

The above holding has been expressly approved in many cases in this Court, notably in California Nat. Bank vs. Kennedy, 167 U. S., 368, and Jacksonville M. P. R. & Nav. Co. vs. Hooper, 160 U. S., 514, 524, 530.

A contract ultra vires the corporation is for that reason unlawful.

Pul. Car Co. vs. Trans. Co., 171 U. S., 138, 149.

> "It is the accepted doctrine of the Courts of this country and England that a contract of a corporation which is prohibited by its charter or the laws under which it is created, either expressly or by necessary implication, is considered as illegal and void, and that in passing upon such contracts the Courts have construed the meaning of the words 'illegal' and 'ultra vires' as identical."

Reese on Ultra Vires, pp. 78, 79, 80, citing English and American cases.

> "In the case at bar the contract * * * was beyond the defendant's corporate powers, and, therefore, unlawful and void, of which the plaintiff was bound to take notice."
>
> St. L. V. & T. H. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

United States Circuit Judge Lurton, then chief justice of Tennessee, in the case of Miller vs. American Mutual Accident Co., 21 S. W. R., 39, 20 L. R. A., 765, in discussing the doctrine of ultra vires said (p. 769):

> "It seems to us that the true foundation of ultra vires lies in the proposition that every act of a corporation in excess of its powers is an act in contravention of public policy, and, for that reason, to be held null and void."

THIRD POINT.

CONTRACTS ULTRA VIRES THE CORPORATION ARE NOT ENFORCEABLE BY THE APPLICATION OF THE DOCTRINE OF ESTOPPEL.

The cases already cited sustain and emphasize the proposition that contracts ultra vires a corporation are not rendered enforceable under the doctrine of estoppel even where the benefits of the contract have been received and retained. It is only in an independent action on quantum meruit, without benefit from the mortgage lien, that such an indebtedness may be established.

The Supreme Court of Iowa rejected the basis on which the Circuit Court rested its opinion in the following language:

> "We cannot agree that a mortgage given by a debtor corporation on its own property was intended to be covered by this proviso. It is a matter of public knowledge that within a comparatively late period many companies engaged in the business of making loans on real estate security have adopted a method of procuring funds to invest, by which they issue their own bonds or debentures, which are placed in the hands of a trustee for sale, and which are secured by real estate mortgages taken by such companies for other loans which they have made. For something on this subject, see 2 Cook, Stockh. & Corp. Law, Sec. 777. At about the time of the enactment of this amendment, companies were operating extensively in Iowa on this system. The amount of indebtedness, where this manner of business was carefully and honestly done could not under ordinary circumstances, prejudice any person interested in the corporation; and we can see good reason for taking such companies out from under the restriction of the original section. We think this proviso applies to a class, and not to a condition; that it singles out this particular kind of corporation, and

is not meant to point out a state of affairs which it was thought might exist with any corporation."

Beach vs. Wakefield (Ia.), 76 N. W. R., 688, 694.

The Circuit Court of Appeals denied all the defenses of appellants on equitable grounds thought not to rest on the principle of estoppel, but we submit that they were in reality but an application of that doctrine. The cases which, in the judgment of that Court, defeated us, are characterized by it thus:

"They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts." 82 Fed. Rep., 135.

In this Beach case, to be printed as an appendix to opposing counsel's brief, the Supreme Court of Iowa substantially concurred in the opinion of the United States Circuit Court of Appeals. It said:

"The Circuit Court of Appeals, passing upon this issue in the action between these parties, said: 'Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. * * * * These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity; and upon the principle that he may not at the same time accept the benefits and repudiate the burdens of his contract.' We take this rule to be correct, but we conceive it to be only an indirect assertion of the doctrine of estoppel. All parties who join here in the attack on this mortgage have been benefited by the transaction; for, as we have said, the funds secured thereby were used to improve the property upon which they have their liens, or against which they make their claims. We think the plea of estoppel is good against the Terminal Company and those claiming under it; but whether we rest the holding in terms upon this

> ground, or upon the general equitable principle stated by the Federal Court, the result is the same; the cross petitioners have no standing to object to the bonds or mortgage of the Trust Company."
>
> Beach vs. Wakefield, 76 N. W. R., 688 (695-6).

The Terminal Company was held to be a railway corporation by the Circuit Court of Appeals, 82 Fed. Rep., 130. In the case of Beach vs. Wakefield, the Iowa Supreme Court likewise held the Terminal Company to be a railway company. "We think the Terminal Company was a railroad corporation."

> Beach vs. Wakefield, 76 N. W. R., 692, Div. 3.

This brings the Terminal Company clearly within such authorities as Jacksonville M. P. R. & N. Co. vs. Hooper, 160 U. S., 515, 524.

It is unnecessary to determine whether this Court will apply its decisions on the doctrine of ultra vires and estoppel to all corporations alike, for this Terminal Company is a quasi-public corporation, a railway corporation (76 N. W. R., 692, par. 3). It was organized under Chapter 139, of the Acts of the 20th General Assembly of Iowa, entitled "Union Railway Depot Law," which contained such recitals as these:

> "In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another, and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given, etc."

to organize such corporations as the Terminal Company with the right of eminent domain. The language of this Court is so apt upon the proposition now under discussion that we repeat a brief quotation from a recent case.

> "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the right of the corporation to plead its wants of of the State Courts, in this Court it is settled in favor power; that is to say, to assert the nullity of an act which is an ultra vires act. * * * * No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.. * * * * A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."
>
> Cal. Nat. Bk. vs. Kennedy, 167 U. S., 367 (371).
>
> Pullman Car Co. vs. Transp. Co., 171 U. S., 138.

It seems to us a satisfactory answer to the position of the Circuit Court of Appeals to say that, whatever may have been the position of appellants in the State Court as to asking affirmative relief in equity, they have not sought affirmative relief in the Federal Court, and do not seek such relief here. It is the appellee in this suit that seeks equity—that seeks the affirmative aid of equity to enforce its ultra vires and unlawful bonds and mortgage.

FOURTH POINT.

THE BONDHOLDERS ARE CONDEMNED, NOT PROTECTED, BY RECITALS.

For the first time in the history of this litigation, opposing counsel will contend that he is protected by recitals, and will base that contention upon the recital of authority in the mortgage (Record, p. 142), and by the express reference in the bonds to the mortgage as a part of the contract (Record, pp. 211, 144). Each bond is numbered from 1 to 1,250 inclusive, and contains this

recital: "This bond is one of a series of bonds not exceeding in the aggregate $1,250,000." (Record, pp. 211, 144.)

Each bond contains the further provision that it is "secured by a mortgage or deed of trust duly made and delivered by the said company to the Trust Company of North America, trustee, for the holders of all of said bonds;" and also the further provision in the trustee's certificate that, "This bond is one of the bonds described in the mortgage deed of trust therein mentioned."

Counsel will rely on the recitals in the mortgage, not in the bonds. But the mortgage (pp. 140-156) contains, among others, the following recitals:

> "Resolved: That this company make and issue, in the name and under the corporate seal of this company, 1,250 bonds, of the sum of $1,000 each, amounting in the aggregate to $1,250,000, numbered from 1 to 1,250 inclusive." (Record, p. 143.)

> "First: The party of the first part shall make, execute and deliver to the party of the second part, bonds of the party of the first part intended to be secured hereby, to the amount of $1,250,000." (Record, p. 147.)

The Circuit Court of Appeals correctly found that appellee and the bondholders "had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being." 82 F. R., 133.

> "In the case at bar, the contract * * * was beyond the defendant's corporate powers, and, therefore, unlawful and void, of which the plaintiff was bound to take notice. * * * * If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in pari

delicto with the defendant. The invalidity of the contract, in view of the law of which both parties were bound to take notice, was apparent on its face."

St. L. V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

Instead of containing recitals in any way helpful to appellee, both the bonds and mortgage in controversy contained such recitals as, considered in connection with the charter of the corporation and the law of the state, of which all parties were conclusively charged with notice and knowledge, disclosed to the trustee and to every bondholder that the bonds and mortgage were alike ultra vires and unlawful.

Indeed, the Iowa Court in the Beach case says of this transaction that "upon its face the act done was in excess of the charter power." 76 N. W. R., 695.

This proposition is strengthened by the fact that the bonds in controversy are non-negotiable, in that the amount required to be paid is rendered uncertain by the provision in the bonds under which the Terminal Company agrees to pay national, state and city taxes, that otherwise might be required "to be deducted * * * * from the interest." (Record, p. 144.)

The notes represented by appellants are shown by the schedule set out in the record on pages 78-82. These notes were sold to different Eastern parties, but never in amounts larger than $5,000. Such a note did not disclose any other indebtedness whatever, and each taker was ignorant of the fact that other notes were out. Moreover, these then unsecured notes took up other like earlier notes in a continuous line of indebtedness, reaching back of the bonds and mortgage. Not only are the notes

of appellants, and the indebtedness represented thereby, finally adjudicated (Record, p. 83), but the validity of the indebtedness is admitted by appellee (Record, p. 62, 243-4, 233,242,245). The appellants are the only bona fide creditors of the insolvent Terminal Company, and are entitled to priority in payment over these ultra vires and unlawful bonds, whose holders are in pari delicto. As against such guilty bondholders, equity should hold the property of this insolvent Terminal Company (not only insolvent now, but always so during and prior to giving the assailed mortgage), in the nature of a trust, and in priority for appellants as the only bona fide creditors.

Taylor on Corps., 4th Ed., Secs. 272-3.
Bk. of Chattanooga vs. Bk., 9 Heisk. (Tenn.), 408.
First Nat. Bk. vs. Kiefer Co., 95 Ky., 97.

FIFTH POINT.

THE BONDHOLDERS ARE IN PARI DELICTO.

By the authorities already cited, it is clearly shown that lenders of money to a corporation, limited by its charter in respect to the amount of indebtedness that it may incur, are put upon inquiry as to whether that limit is being exceeded or not, and must ascertain that fact at their peril.

Robbins' Law of Mortgages, p. 274.
Chapleo vs. Brunswick Bldg. So., 6 Q. B. D., 696.
Ex parte Watson, 21 Q. B. D., 305-306.
Lady Wenlock vs. Riv. Dee Co., 10 App. Cas., 354.

We do not need to go so far in this case, however, as do those authorities, for the reason that the bonds and

mortgage on which appellee seeks affirmative relief both disclosed to said appellee, and to every bondholder, by their express terms, that they were ultra vires the corporation, and unlawful; that they carried an indebtedness twice the size the corporation might lawfully incur. In such a case the parties are in pari delicto.

> "The general rule, in equity, as at law, is in pari delicto potior est conditio defendentis; and, therefore, neither party to an illegal contract will be aided by the Court whether to enforce it, or to set it aside. * * * *
>
> When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a Court of law nor a Court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. * * * *
>
> If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face."
>
> St. Louis V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 752.

Having deliberately violated the charter and the statute, these bondholders, on their unlawful contracts, should not be paid out of the funds of this insolvent corporation, until appellants, as bona fide creditors, are paid in full.

> Taylor on Corp., 4th Ed., Secs. 272-3.

SIXTH POINT.

THE MORTGAGE AND BONDS IN CONTROVERSY CONTRAVENE THE STATUTE LAW OF IOWA.

The indebtedness sued on is illegal, because it is ultra vires the corporation; but it is also illegal because it contravenes a plain prohibition of Iowa statute law. This question has already been anticipated somewhat in the argument.

The statute law of Iowa, Sec. 1611 of McClain's Code, of Iowa, reads thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

The appellee seeks the aid of a Court of equity to enforce a contract that on its face contravenes statute law. This the Circuit Court of Appeals and the Iowa Supreme Court conceded. The bonds, and the mortgage evidencing the indebtedness, are presented to the Court as the sole evidence and basis for an affirmative decree. They are made illegal by the plain prohibition of the statute, and yet the Court is asked to decree their validity and foreclosure.

"Must in no case" are the strong, plain words of the Iowa statute. We say that this mortgage is illegal because it offends against the statute; that it is also illegal because it offends against the public policy of the state as declared in the statute and at common law. The parties at their option cannot thus repeal the statute, and Courts ought not to do so. Estoppel should not become a license for premeditated violation of charters and statutes.

Opposing counsel says that there is no provision that the excessive debt shall be void, and that in the absence of such an express declaration an offending contract will not be held void. It is true the statute prescribed no penalty. Its purpose was to prohibit its violation, and not to permit its violation under penalty.

"When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Miller vs. Ammond, 145 U. S., 426.

27 Am. & Eng. Ency. Law, p. 378, citing cases.

Litchfield vs. Ballou, 114 U. S., 190.

Cinn. Co. vs. Rosenthal, 55 Ill., 85.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

"It is a general rule of law that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

Reese on Ultra Vires, Sec. 69.

"Nor will Courts, even with the consent of the parties, enforce a contract which is in violation of a statute, although not otherwise declared void."

Reese on Ultra Vires, Sec. 69.

"So when a contract is tainted with illegality, the law will not lend its aid to either party for the enforcement of such a contract, and neither a Court of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality. * * * * The attempt to contravene the policy of a public statute is illegal. Nor is it necessary to render it so that the statute should contain any express prohibition of such an attempt. It always contains an implied prohibition."

Reese on Ultra Vires, Sec. 69.

SEVENTH POINT.

THE IOWA DECISIONS FURNISH NO RULE UNDER WHICH THIS COURT SHOULD DEFEAT APPELLANTS, OR ANY OF THEM.

All the Iowa decisions touching such a charter limitation on indebtedness concede that contracts for excessive indebtedness are ultra vires and unlawful. In reference to this very mortgage, the Iowa Supreme Court, in Beach vs. Wakefield, 76 N. W. R., 694, said:

> "The indebtedness for which this mortgage was given being in excess of the amount fixed by law, it remains to be seen whether complainants have any standing to attack the validity of the transaction. The rights of all these cross petitioners accrued subsequent to the making and recording of this mortgage. While Wakefield's lien, in part, is given priority over the mortgage, his contract was made and his work was done after the mortgage was made, and with full notice of it. The other complainants are the holders of an indebtedness that was incurred also in violation of the statute. The Terminal Company, which joins in the attack, has received, and still retains, the benefit of the funds obtained on this mortgage. The Circuit Court of Appeals, on appeal from the Federal Circuit Court of the case between these parties, and which may be found in 82 Fed. R., 124, affirmed the lower Court, but rested its holding upon the ground that complainants could not be heard to assert the invalidity of the Trust Company's mortgage. The general rule, as stated in Twiss vs. Association, 87 Iowa, 733, 737, is that 'where an ultra vires contract is made, and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required, in a proper action, to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice.' To like effect are the cases of Garrett vs. Plow Co., 70 Iowa, 697; Warfield vs. Canning Co., 72 Iowa, 666; Humphrey vs. Association, 50 Iowa, 607."

The Court in this quotation, in which it attempts to review and restate the effect of its own decisions, admits that the indebtedness is "in excess of the amount fixed by law;" admits that said indebtedness was incurred "in violation of the statute;" and on page 695 admits that "upon its face the act done was in excess of the charter power," and says:

> "The general rule, as stated in Twiss vs. Association, 87 Iowa, 733, 737, is that 'where an ultra vires contract is made, and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required, in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice.' To like effect are the cases of Garrett vs. Plow Co., 70 Iowa, 697; Warfield vs. Canning Co., 72 Iowa, 666; Humphrey vs. Association, 50 Iowa, 607."

What does this mean? We submit that it means nothing more than that the party may be required "in a proper action to account," for that is what the opinion says. That a recovery may be had under proper pleadings on quantum meruit, we do not deny, but frankly admit. This, however, would not carry the benefit of the unlawful mortgage. A loan in excess of the charter limit may permit a judgment for money had and received; but no affirmative aid in equity can be given on the mortgage and bonds as contracts, for they are the unlawful agreement of the parties. But such a judgment can be had only in a proper action on an implied agreement to return the money—a mere money judgment, in this case without security, for an Iowa mortgage gives neither title nor possession, and avails nothing except by the aid of equity, which, in such cases, is wholly denied.

A further quotation from this same case, Twiss vs. Guarantee Life Association, 87 Iowa, 733, 735, will make the rule of the Iowa Court manifest:

> "We have directed our attention to the question as to whether the contract was such an obligation as the Southwestern Association was authorized to make by its articles of incorporation. If it was in excess of its power, it is void, and cannot be enforced as a contract; and while in such case, where an ultra vires contract has been partly performed, the party repudiating it may be compelled to account for whatever benefits may have been received by reason of it, yet this exception, or rather modification, of the rule, has no application in the case at bar. * * * The facts of the case bring it within the rules announced in Lucas vs. White Line Transfer Co., 70 Iowa, 542; Davis vs. Old Colony Railway Co., 131 Mass., 258."

In Lucas vs. White Line Transfer Company, 70 Iowa, 546, the Court said:

> "Where a third party makes with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will make it valid. * * * * *
>
> It is questionable, on the authorities, whether even the consent of all the stockholders could make the contract valid, when it was so plainly beyond the powers granted by their corporation."

Willett vs. Far. Sav. Bk., 77 N. W. R. (Ia.), 519.

We wish to emphasize the statement in the case of Beach vs. Wakefield, that the case of Twiss vs. Association, 87 Iowa, 737, states "the general rule" on the doctrine of ultra vires as applicable to this mortgage and

the bonds thereby secured, and also the other statements already quoted, that the trio of Iowa cases, on which opposing counsel and the Circuit Court of Appeals alike rest their contentions, are, in the language of the Iowa Court, "to like effect" as the Twiss case, which, as shown above, expressly quotes with approval the leading case of Davis vs. Old Colony Railway Company, 131 Mass., 258. That case cites with approval the leading English cases, and is a masterly discussion of the doctrine. We make two brief quotations from it:

> "The Court is of opinion that the agreement is ultra vires, and, therefore, no action can be maintained upon it against either defendant. * * * *
>
> Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted."

In adopting this Old Colony case (131 Mass., 258), with the added statement that the Iowa cases, on which opposing counsel rests his right to affirmative relief, are "to like effect," the Supreme Court of Iowa announces and adopts the doctrine of ultra vires in harmony with the leading decisions upon that doctrine both by the Supreme Court of the United States and the highest Courts of England. The decisions of the Supreme Court of Iowa do not furnish a precedent for the statement that "the settled law of Iowa" is at variance with the decisions of this Court or the English Courts.

As in the Old Colony case, so in the case at bar, the articles of incorporation were spread upon the public records of the County and of the State.

In this connection, and prompted thereto by the suggestion in the Old Colony case, supra, we call the Court's attention to some provisions of the Iowa Code in force at the time of these transactions:

> McClain's, Sec. 1610, provides: "Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of secretary of state, in a book kept for that purpose."

McClain's, Sec. 1615, requires the same steps to be taken in reference to amendments, of which the Terminal Company had none.

> McClain's, Sec. 1612, provides for the published notice, and says it must contain a statement of "the amount of capital stock authorized, and the times and conditions on which it is to be paid in. * * * The highest amount of indebtedness to which the corporation is at any time to subject itself."
>
> McClain's, Sec. 1627, provides: "A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted up in a like manner (posted in the principal place of business and be subject to public inspection); which statement must be corrected as often as any material change takes place in relation to any part of the subject matter of such statement."
>
> McClain's, Sec. 1962, applicable to the Terminal Company because it is a railroad, provides: "Every

such corporation shall, annually, under the oath of the president, in the month of January, make a full report of the condition of its affairs to the secretary of state, and shall have the same published in some newspaper printed in the place of its general business office, showing the amount of the capital stock of such corporation, and the amount paid thereon, the amount of bonds issued, and how secured, and all other indebtedness."

McClain's, Sec. 2034, provides for a report to the governor, "first, the amount of its capital stock. * * * * Third, the amount of its funded debt, and the rate of interest. * * * * Fourth, the amount of its floating debt."

The facts of notice and knowledge, pertinent to our inquiry in reference to the Terminal Company, were, therefore, easily ascertainable by a reference to public records equally accessible to all, and these sources of information can only be ignored by those who purpose to deal with a corporation at their peril. The mortgage itself was recorded long prior to the sale of the bonds.

As opposing counsel will contend that the Iowa cases forestall adverse action by this Court, they may be further considered.

In the case of Humphrey vs. Patrons Mercantile Association, 50 Iowa, 607, the contract was not in fact contrary to the statute, nor even to the amended articles. That case, on page 612, expressly excludes a determination of the question involved in this case. Even without the amendment, the innocence of the creditor is regarded as important. 70 Iowa, 547.

In Garrett vs. Burlington Plow Company, 70 Iowa, 697, the indebtedness did not, as a single item, exceed the charter limit. The question of an indebtedness made up of separate and single transactions, each in and of

itself within the limitation, may be distinguished from a lump indebtedness positively violative of the statute. In that case, also, the mortgage was given as a subsequent transaction to secure, not a single excessive indebtedness, but an excessive indebtedness created by piece-meal, no part of which singly proclaimed the violation of the charter or the statute.

In Warfield vs. Marshall Canning Company, 72 Iowa, 666, the mortgage was given subsequently to the incurring of the indebtedness, and the indebtedness may have been made up of separate items, each within the charter limit, and all of the indebtedness was within the limit of the authorized capital stock. This case emphasizes the good faith of the creditor (701) for whom this subsequent mortgage was made; but good faith is destroyed under an unlawful contract where the parties are in pari delicto. Good faith cannot rest on violation of the charter, violation of the statute, and violation of public policy, knowingly and deliberately entered upon.

It is evident that the use of the word ultra vires in this case (p. 672) is an inadvertence, as shown by the authority cited, and at most evokes the doctrine of estoppel as to a strictly private corporation, and that on mere dicta, for in this case no indebtedness was enforced, nor was affirmative relief granted to any party.

We do not admit that it follows from these Iowa cases that a mortgage given to secure bonds which in a present and single indebtedness proclaim their own violation, not only of the articles of incorporation, but also of the statute of the state, will be enforced affirmatively by the Court. If the parties acting together, can knowingly and deliberately repeal the statute, and the Courts will recognize the repeal by affirmative action, then the legislature is no longer supreme.

The Trust Company voluntarily chose the Federal forum for the foreclosure of its mortgage, but was made an unwilling defendant in this case of Beach vs. Wakefield, 76 N. W. R., 688, pending in the State Court for the foreclosure of mechanics' liens on the Terminal property, and by cross petition asked the State Court to rank its lien, but nothing more. Appellants were also made unwilling parties to the mechanics' lien suit in the State Court, and were compelled therein to affirmatively assail appellee's mortgage and bonds by cross petition. The foreclosure case in the Federal Court contains no reference to, nor record of, the suit in the State Court. After the cases were at issue, appellants herein endeavored to hasten a decision in the Federal Court, and requested the State Court to withhold its decision until the case should be determined in this Court, but this appellee resisted, and insisted that the State Court should establish and rank its mortgage lien. The State Court (76 N. W. R., 693) recognized, as to these appellants, the propriety, if free so to do, of leaving the question for prior determination by this tribunal, whose equity receiver now has the possession of the mortgaged premises. Since appellee will constantly refer to the decision of the State Court, this explanation is thought necessary. Although the issues assailing the validity of the mortgage and bonds were first made in the Federal Court, the two cases have proceeded together, but the State Court has made the more rapid progress. The most that can be said of that case is that it has a persuasive force in this Court. Indeed, the Iowa Court has not yet entered any decree on said opinion. The case in the State Court is now pending on petition for rehearing, filed by these appellants, who have again asked, and have reason to expect, that the State Court will withhold its decision on the rehearing until after the decision of the case by this Court.

The case of Beach vs. Wakefield, 76 N. W. R., 688, 694, is the first declaration of the Iowa Court applying the doctrine of estoppel to contracts that are ultra vires the corporation, and make disclosure of that fact upon their face. That case, in its final analysis touching the question of the charter limitation, admits that the contracts are ultra vires the corporation and unlawful, but denies these appellants relief under the doctrine of estoppel. The Iowa Court refused to affirmatively decree the bonds and mortgage invalid, because appellants had not the necessary standing therein to assail the bonds and mortgage, in that the Terminal Company had received and retained the proceeds of the bonds. There is a world of difference between the request of appellants for an affirmative declaration by the Iowa Court against the validity of the bonds and mortgage, and their negative position in this case, where the bondholders seek affirmative equitable relief upon their ultra vires and unlawful bonds.

The case of Beach vs. Wakefield turns, in so far as the violation of the charter limit is concerned, upon the application of the doctrine of estoppel to an admittedly ultra vires contract. In so far as the Iowa Court construes the Iowa statute or the charter, it concedes that the transaction offends against both, and is ultra vires and unlawful. The Iowa Court refuses to permit appellants to destroy the mortgage by applying the doctrine of estoppel to ultra vires contracts, a doctrine that is not grounded in the Iowa statute nor in any local law or settled rule of property. The doctrine of ultra vires is of as world-wide application as is the law of commercial paper. In the repeated applications of this doctrine by this Court, in the cases hereinbefore cited, it has been free to speak its own views regardless of what the State

Courts, whence the cases arose, may have determined. The decisions, therefore, of the Iowa Court furnish no rule of decision for, and are not binding upon, this Court.

It is said in Beach vs. Wakefield, 76 N. W. R., 694, in reference not to the charter limitation but to the prohibitory statute, that only the State can complain. The statement is sustained by reference to a Pennsylvania and California case, and not by any previous decision in Iowa. This declaration is manifestly limited, for it is quickly followed by the statement that "the Terminal Company should make restitution before it has standing to complain," showing that the statement is, after all, to be construed in the light of and controlled by the single principle of estoppel under benefits retained. Otherwise the Terminal Company could not complain even after it had made restitution. This case, even if it covered the questions involved on this hearing, would be only persuasive, for it is too recent to be binding. This case discusses the provision of the statute rather than the limitation of the charter.

But it is not, and never has been, the doctrine that the State is the only party that can challenge contracts ultra vires a corporation. Every case cited from this Court refutes that doctrine.

Thompson on Corps., Sec. 6034.
Taylor on Corps., 4th Ed., Sec. 297.

As showing that the enforcement of ultra vires bonds will not rest on any construction of the Iowa statute, but only, if at all, upon a misunderstood and misapplied equitable doctrine, the language of the Iowa Court, in Des Moines Gas Co. vs. West, 50 Iowa, 27, may be cited:

> "It is also insisted that the original articles of incorporation of the Gas Company prohibit indebted-

ness to exceed twenty-five thousand dollars, and that the amendment thereto, having been made without authority is void. The bonds were issued in violation of the charter of the company and are therefore not valid."

MOREOVER ALL THE IOWA CASES PREVIOUS TO BEACH VS. WAKEFIELD (WHICH IS NOW PENDING ON REHEARING) RELATE TO PRIVATE CORPORATIONS AND NOT TO QUASI-PUBLIC CORPORATIONS.

The Terminal Company has the right of eminent domain by statute, under which it seized real estate in the heart of the city of Sioux City for a location (Ch. 139, 20th G. A.; Code, Sec. 2100), and is a railway company in which the public is vitally concerned (82 F. R., 130; 76 N. W. R., Div. 3).

Contracts ultra vires strictly private corporations are, in some states, enforced on the contract. Contracts ultra vires strictly public corporations are not enforced either on the contract or on quantum meruit. The rule as to contracts ultra vires quasi-public corporations should at least require disaffirmance of the unlawful contract and only permit a recovery quantum meruit on proper pleadings.

Some Courts enforce the doctrine of ultra vires more strictly against quasi-public than against ordinary private corporations. The public is interested in the acts and operations of railroads, and in keeping them solvent and going concerns; that is especially true of railway companies of the character of the Terminal Company.

Cook on Corps., 4th Ed., pp. 12, 1370-7, Secs. 681, 891.

Cent. Trans. Co. vs. Pull. Car Co., 139 U. S., 24.

J. Ry. Co. vs. Hooper, 160 U. S., 514, 524.

EIGHTH POINT.

THE ENTIRE ISSUE OF BONDS IS VOID.

It is settled that the bonds will not be held valid in part and void in part. They are all void. The Court will not search to ascertain the excess, but will smite the whole issue. The vice cannot be eliminated from the contract by scaling down the bonds. This has been expressly held.

Hedges vs. Dixon Co., 150 U. S., 182.

The law will not be nice in searching out whether some part of an illegal contract may be separated from the rest and be held as valid and legal, but will condemn the contract as a whole, every part of which partakes of the illegality under a deliberate and common purpose to violate the statute. The bondholders are participes criminis. "The holders of the bonds and agents of the city are participes criminis in the act of violating the prohibition."

Litchfield vs. Ballou, 114 U. S., 190.

The limit of indebtedness, at the time the bonds were sold, had not only been reached but was then exceeded. (Record, p. 119; 82 Fed. Rep., 135.) For this reason also not a dollar of the bonds could be legal.

The indebtedness represented by appellants is admitted by stipulation to be valid. (Record, p. 62.) This admission carries with it every fact essential to the validity of appellants' debt, which, in point of time by renewals, reaches back of the assailed bonds. None of the bonds, and no part of any single bond, is shown to be valid, while the validity of appellants' indebtedness is admitted by stipulation as well as finally adjudicated by

the judgment of the District Court of Iowa. (Record, p. 83.)

Since the bonds are illegal and every bondholder a participant in violated law, appellee cannot (even if otherwise free so to do) claim that the bonds are valid up to the limit permitted by the full amount of authorized stock. Appellee will contend that the charter limitation refers to authorized stock without regard to the amount of stock issued or paid up. This is doubtful in any case.

4 Thomp. Corps., Sec. 5705, Note 3.

In this case, however, the charter excludes authorized capital stock from measuring the limit by the provision that the indebtedness "shall not exceed two-thirds of the paid-up capital stock." (Record, p. 191.) The published notice of incorportion provides that, "All the stock issued is to be paid for in cash at the time the same is so issued, and the paid-up capital stock of said company may be increased from time to time upto the amount of the authorized capital." (Record, p. 194.) When the bonds and mortgage were executed, not to exceed $200,000 of stock had been issued. (Record, p. 193.) The record, pages 224-5, shows that on February 22, 1890, the stock had just been subscribed, but not yet issued. Gratuitous city franchises were used as a subterfuge to get the stock of the Terminal Company out. (Record, p. 200, 184.) But again we say that this question has become immaterial under appellee's own evidence, which shows that the debt limit was already exhausted when the bonds were sold. (Record, p. 119.) As bearing on the question that the entire issue of bonds is void, we cite:

Hedges vs. Dixon Co., 150 U. S., 182.

Holliday vs. Hilderbrandt, 97 Ia., 177.
Ind. Dist. vs. Soc. Sav., 67 N. W. R., 370 (Iowa).
Anderson vs. Orient Ins. Co., 88 Ia., 579.
Litchfield vs. Ballou, 114 U. S., 190.
Doon Township vs. Cummins, 142 U. S., 366.
Crogster vs. Bayfield Co. (Wis.), 74 N. W. R., 635.

NINTH POINT.

APPELLANTS TENDER EQUITY.

If the bonds and mortgage are held to be ultra vires and wholly void, this Court will so declare, and will refuse affirmative aid to appellee, in which event appellants' tender of equity will not be considered. The Court will declare the law of the case regardless of the tender. If, however, our view of the law of ultra vires is not sustained, and the case is to be determined on relative equities, and the contract enforced by the application of the doctrine of estoppel, then the tender becomes pertinent. Opposing counsel has intimated that a Court needs no inducement to declare the law. We concur. But if the assailed contracts are voidable only, as counsel contends, then to stay their affirmative enforcement, a tender to do equity as a basis of receiving equity, may be pertinent.

And so, if the Court regards this as a proper case for determination under equitable principles, and for a tender of equity, then these appellants, in behalf of the indebtedness they represent, offer to waive all benefit of liens, if appellee will do likewise, and to share pro rata in the proceeds of the Terminal property, all without benefit of security. The Terminal Company joins in this tender as it does in all defenses. Will appellee accept the tender? If not, then the Court

may, if it considers the offer and its enforcement essential to the destruction of the mortgage contract, enforce the same even though the appellee should not voluntarily accept it. There is, of course, no claim that the Terminal Company has ever received the face of the bonds.

Appellants made a similar tender in the Circuit Court and in the Circuit Court of Appeals (Record, p. 314, 316), and do not withdraw from the position taken in their brief and petition for certiorari. The controversy between the noteholders and the bondholders is in reality one between non-residents of Iowa. (Record, p. 75-84.) The noteholders are bona fide creditors. The bondholders stand in pari delicto. The noteholders should be first paid in full. Equity requires this, but appellants make a better offer.

Taylor on Corps., 4th Ed., Secs. 272-3.

We ask the Court to consider the interests of the several appellants independent of each other.

The Terminal Company: Counsel claims that the Terminal Company received the benefit of the sale of the bonds. On this point the evidence is not clear, for witness Hornick says that the proceeds of the bonds went to take up syndicate notes, and if this is true, the Terminal Company received the benefit of only a small part of the bonds. (Record, p. 182.)

As to Hubbard, Trustee: The evidence shows that Hubbard has a trust deed (Record, pp. 233-242) upon all the Terminal properties to secure $718,000 of notes (Record, pp. 78-82 shows part of them), which

were sold to numerous different parties without disclosing that other like notes had been sold.

As to the Credits Commutation Company: This company is a judgment creditor of the Terminal Company for $616,500 of said notes in principal and $75,596.95 as interest. (Record, p. 83.) Should the lien of the Trust Company of North America be held non-enforceable, this judgment would become a first lien. Moreover, the indebtedness represented by this judgment and by the trust deed to E. H. Hubbard, trustee (the former being included in the latter), is admitted by the Trust Company of North America to be valid. (Record, p. 62).

The Trust Company of North America in the Circuit Court of Appeals got nothing except from the grace and bounty of equity. Appellants' offer means equality, and equality is equity.

Respectfully submitted,

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No. 192.

Brf. of Coombs & Taylor for Appts

APPELLANTS' REPLY BRIEF.

Supreme Court of the United States.

Filed Jan. 23, 1899.

OCTOBER TERM, 1898.

No. 192.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN C. COOMBS, 25 Equitable Building, Boston, Mass.,
HENRY J. TAYLOR, Sioux City, Iowa,
Solicitors and of Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1898.

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SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

In the limited time between the filing of appellee's argument and the hearing, we cannot assume to more than notice a few of the statements therein and that only to correct errors.

1. Counsel says in his brief, page 7, that the record does not disclose whether or not the capital stock was increased by amendment to the charter. There never was any attempt to amend the charter in this or any other regard. The charter was introduced by appellants. (Record, 189–192.) The Record (193–5) shows the recording, notice, etc. The steps essential to amendment are shown in the articles (Record, p. 191, Art. 16) and in the statute (appellee's brief, p. 34). The records (189–227) of both directors and stockholders, meeting by meeting, are given. No attempt

to change the charter is shown. Counsel admits, what the records show, namely, that the S. C. & N. R. R. "is the sole and only stockholder" (save qualification shares) and this is shown to be one million dollars only. (Record, pp. 164, 178, 180-1, 197, 200, 204, 225-6, 171.) The evidence shows that one million dollars is *all* the stock of the Terminal Co. (Record, pp. 180-1, Art. 4 on 190, 192, 193, 194, 195, 137.)

2. Counsel insists in his brief, pages 21–3, that the Court shall assume an amendment increasing the authorized stock to two million. The evidence shows the fact to be that the highest amount of authorized capital stock was only one million. There is no room for presumption. The charter stood in the way of any increase. The evidence shows no attempt to increase the stock.

In the Handley case cited by counsel, page 22, the charter already authorized the increase, and the increase was in fact made, but in an irregular manner.

The position of counsel is absurd. Suppose a cemetery association is prohibited from issuing life insurance policies, and yet its officers in its name issue a thousand of them, counsel would say that the cemetery company would be bound, because the stockholders under forms of law might have taken steps to strike out the prohibition and insert insurance powers, and that it would not be material what the fact was, for the presumption would control the fact. This cannot be so as to a charter power, for the party dealing with the corporation is charged with the knowledge of the limitations of charter. Appellee relied on no attempted change, and was not misled. Its president knew that the authorized stock was only one million. (Record, 137, Appellants' Brief, p. 16.)

The presumption of knowledge of the limitations of the charter is conclusive.

3. Counsel refers to a second mortgage "subject to the lien of said prior deed of trust". (Appellee's brief page 5.) The status of this mortgage should be shown. It is set out on pages 15–18 of the record. There is no evidence fixing the exact time when this so-called second mortgage was taken by the Union Loan & Trust Company. The mortgage itself purports to have been signed and acknowledged on the 24th day of April, 1893, the very day the Union Loan & Trust Company voted to make its assignment for the benefit of creditors, which it actually did on April 25, 1893. The mortgage was not made to secure any of the Terminal notes that had been negotiated through said Trust Company and that make up the notes represented by the Credits Commutation Company or Hubbard, Trustee (Record, pp. 78–82), nor the notes mentioned in the stipulation of the parties (Record, pp. 243–4), but said mortgage purports to secure other notes *of even date therewith*. No such notes were ever negotiated. None of the notes in controversy bear even date with the mortgage, but a much earlier date.

The interests represented by the appellants do not rest in any manner upon said alleged mortgage, nor can said alleged mortgage conclude nor preclude the appellants from any of these rights under the issues in this case.

The first twenty-four pages of the printed record refer to an old suit brought by only a half dozen banks for the foreclosure of said alleged mortgage, and the very most that can be gotten out of that mortgage is a prejudice, if any, to the notes represented by such banks. If all of those notes should be held to be prejudiced by said procedure it would reduce the indebtedness of E. H. Hubbard, Trustee, by only a few thousand dollars, if indeed any of said notes could be shown to be therein included. As that is the most and the worst that can be urged because of the alleged

second mortgage, its concession, if necessary, leaves our rights intact and the amount of the claim of the creditors practically unchanged. The Court of Appeals speaks, in the fifth division, of determining the " rights of the owners of these notes under their second mortgage of April, 1893 ". But no such rights are asserted, and, with the exception of the first suit on the part of said six banks, no rights have been asserted under either said mortgage or said notes, and the court in making the statement that any rights thereunder were before it for adjudication lost sight of the issues, for neither the mortgage nor the notes thereby secured are in any manner presented for determination. The old suit by said six banks was at once abandoned. Entirely different notes are involved, and in no manner do they rest, nor is it claimed that they rest, upon the second mortgage, nor is there any testimony that the second mortgage was made for their benefit, nor that the noteholders in question ever knew of or accepted the same. The allegations of the petition of those six banks is all that there is in this case touching this matter, and that petition was never introduced in evidence. For what purpose the second mortgage, referred to in the Court of Appeals, and evidently wholly misunderstood, was executed and delivered, if any delivery was made, is not shown. Even if it was formally handed into the Trust Company on the day before its failure and on the very day it voted to assign, it cannot be held to prejudice the rights of creditors who neither knew anything of it nor will have anything to do with it. It was not competent to thus validate an *ultra vires* contract. No bondholder is shown to have relied on or to have even known of said alleged mortgage. Neither appellants nor appellee were injured or benefited thereby or in fact knew thereof.

4. On page 11 of his brief counsel refers to a provision

first appearing in the Code of 1897, which went into effect October 1, 1897. This was years after this suit was begun and was even after the Court of Appeals had rendered its decision herein. Counsel uses it only as an aid to his interpretation, but it seems to us to have the opposite force and to be in fact immaterial in this suit.

5. Counsel asks a *quantum meruit* (Brief, 23-4) recovery with benefit of the mortgage lien. He admits that the full amount of no bond was ever paid to anybody, but claims that $1,137,500 were received by the Terminal Company on the entire bonds.

There were no pleadings for such a recovery, but only "on the bonds" (Record, 39).

The mortgage purports to secure only the "bonds."

It is not shown that the bondholders are assignees of any implied debt but of only an aggregate of nothings—"bonds."

Even if the bonds were negotiable in form the mortgage is a part of the agreement of the parties, and must fall with the bonds. It secures only the "bonds", not the implied debt. Equity will not aid the parties on their contract, but, if at all, only on a contract *implied* by law. The law does not imply a mortgage to secure the implied debt. Equity is not thwarted by such a subterfuge. Equity will not thus assist the party upon the unlawful contract.

6. Counsel insists that on October 11, 1898, the Iowa Court, in a suit not made a part hereof in the pleadings, held this mortgage to be voidable only in a suit by the State. This statement did not refer to the charter, nor to any provision in the statute. To kill the debtor is to bar all remedy. Even if the Iowa case is to be given that force, it is too recent to control this. No previous declaration to that effect had been made. It expressly rests on no previous Iowa case. The context shows that the Court limits this statement by giving the Terminal Company standing on making

restitution. The language may not be apt but it becomes only a statement of the estoppel argument. The language of the statute is a strong prohibition. The real appellants and appellee are non-residents of Iowa. The appellants in the Iowa case are all held by that Court to have sought affirmative relief, and the Credits Commutation Co. plead no judgment therein, but here the appellee pleads a violation of both the charter and the statute as a basis for equity and the position of appellants is only negative. For such changed positions the Iowa case is *dicta*. Not only the statute but the charter imposes the prohibition. The bondholders are *in pari delicto*. The Terminal Company is a quasi-public corporation in which the public has great concern. The Iowa Court expressly finds (appellee's brief, p. 45) that "upon its face the act done was in excess of the charter power"; that the indebtedness was "in excess of the amount fixed by law" and was incurred "in violation of the statute" (76 N. W. R., 694); that the Twiss case (87 Iowa, 737) states the general rule and that "to like effect" are the Iowa cases relied on by counsel. The Twiss case (87 Iowa, 735) approves the rule of *ultra vires* laid down in Davis *vs.* Old Colony Ry. Co., 131 Mass., 258. In Gas Co. *vs.* West, 50 Iowa, 27, speaking of bonds in excess of the debt limitation, the Court said: "The bonds were issued in violation of the charter of the company, and are, therefore, *not valid*". Let us put two sentences side by side and look at them again. In the Twiss case (87 Iowa, 735), so accepted by the Iowa Court as stating the rule of all its past decisions, it is said: "If it (the act) was in excess of its (charter) power it is void and cannot be enforced as a contract". Of this Terminal mortgage the Iowa Court said: "Upon its face the act done was in excess of the charter power" (76 N. W. R., 695). Then why does it not also follow that this contract in

controversy "cannot be enforced *as a contract*"? That would seem to be the only logical conclusion, and is made more emphatic by the adoption of the case of Davis *vs.* Old Colony Ry. Co., 131 Mass., 258. Moreover, this Iowa case is now pending on petition for rehearing without a decree of affirmance, and that Court will doubtless give respectful consideration to the decision of this Court.

TERMINAL COMPANY HAD NO AUTHORITY TO MORTGAGE ITS PROPERTY.

In the haste of closing our brief one assignment of error is not clearly stated, and there should be added at the close of the first paragraph on page 8 thereof:

> It is against public policy and against the laws of Iowa to permit said Terminal Company to mortgage either its real estate or its franchises owned at the time of said mortgage or subsequently acquired; that said Terminal Company had no authority by law to mortgage its property. (Record, pages 273, No. 2; 274, No. 10, 66, 73.)

We refer the Court to pages 37–46 of our Petition for Certiorari and to pages 22–3 of our Brief supporting said petition for printed copies of the Statutes relied on and for our argument on this assignment, and ask the Court to make the same a part of our first brief by this reference.

In the opening paragraph of appellee's brief, the Terminal properties are described as "consisting of about a mile and a quarter of railroad in the heart of the city and certain lots and blocks on which were situated passenger, freight depots, elevators, warehouses, etc." Under the first *proviso* (appellants' brief, p. 5) railroad companies are excepted from that section, 1611 (record, p. 5), so far as to allow them to contract indebtedness for construction and equip-

ment to the amount of $16,000 per mile which would authorize a total bonded indebtedness of only $20,000 for construction and equipment, and yet the "railroad" is included in this mortgage for a million and a quarter. It is evident from the mortgage (142-3) that the loan is for this terminal property "within the limits of Sioux City", so that even if the Terminal Company should not be limited to $16,000 per mile by the first *proviso* to section 1611 (appellants' brief, p. 5) this mortgage violates the limitation of both section 1611 and said first *proviso* and so violates public policy by offending against each indebtedness and the aggregate of both. We think it was never intended that this Union Depot property should be burdened by a mortgage at all and least of all upon an unbuilt railroad. This excessive mortgage does disable the corporation from performing its duties to the public even if that result is not brought about at once.

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No. 504. 1897

Original

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JAMES H. McKENN

Brief of Call for Respondent

In the Supreme Court of the United States.

Filed Nov. 15, 1897.504

OCTOBER TERM, 1897.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN & TRUST COMPANY,

APPELLANTS AND PETITIONERS,

VS.

TRUST COMPANY OF NORTH AMERICA, TRUSTEE,

APPELLEE AND RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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In the Supreme Court of the United States.

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioner moves this court to issue its writ of certiorari under the provisions of Section 6 of the Act of Congress of 1891, to review the decree of the Circuit Court of Appeals for the Eighth Circuit, which, save for the discretionary power therein conferred, is by the same Section made final and conclusive.

The decision complained of is reported in Volume 82, Federal Reporter, page 124.

The brief of Petitioners bristles with points which are all claimed to be of national importance and peculiar magnitude, but the only point made which has ever been con-

sidered a fairly debatable question is whether a corporation can take advantage of its own wrong to defeat its honest creditors, on the plea of *Ultra Vires*, where the act of borrowing was within the scope of its general powers but contrary to the regulations of the statute.

This question has now been so thoroughly settled by this Court in a long and harmonious line of cases, that it is no longer a debatable subject.

National Bank vs. Matthews, 98 U. S., 621 and 629.

National Bank vs. Whitney, 103 U. S. 99-102.

Fritts vs. Palmer, 132 U. S. 282, 292.

Logan Co. Nat. Bank vs. Townsend, 139 U. S. 67-76.

Thompson vs. St. Nicholas Nat. Bank, 146 U. S. 240-251.

The second point proposed, that a junior creditor of the mortgagor corporation can defeat a mortgage which the mortgagor cannot, has never been considered doubtful, and is now settled.

Graham vs. Railroad Company, 102 U. S. 148-153.

Mattingly vs. Nye, 8 Wall. 370.

Sexton vs. Wheaton, 8 Wheat. 229.

Warfield vs. Marshall Co. Canning Co., 72 Iowa, 666-670.

Garrett, Trustee, vs. Burlington Plow Co., 70 Iowa, 697-701.

National Bank vs. Whitney, 103 U. S. 99-103.

Darst vs. Gale, 83 Ill. 136.

McAllister vs. Plant, 54 Miss. 106.

R. R. vs. Cowdrey, 11 Wall. 459.

Herman on Estoppel, p. 1316.

The third suggestion of Petitioners, that they will prorate with respondents, which has been injected into the case since the hearings in Circuit Court and Circuit Court of Ap-

peals, does not rise to the dignity of a legal question, but partakes rather of the character of bartering and bargaining against established principles of law—under any view not of sufficient importance to call for the interposition of this Court by certiorari.

HISTORY AND STATEMENT OF THE CASE.

The Sioux City Terminal Railroad & Warehouse Company was incorporated under the laws of Iowa, in August, 1889, with A. S. Garretson, T. P. Gere and D. E. Paullin as its provisional board of directors. These persons were also its officers, A. S. Garretson being president, T. P. Gere vice president and D. E. Paullin secretary. Under the articles of incorporation the company reserved to itself the power to build two or more lines of railway north, south, east and west through Woodbury county as well as to purchase and improve terminal grounds and facilities for its lines of railway, and power to own, lease and mortgage the same. The corporation never acquired any lines of railway except such as were contained on the terminal grounds in Sioux City. These grounds were largely acquired in the fall of 1889, consisting of a row of blocks between Second and Third streets in Sioux City extending from Division street on the east to Pearl street on the west, being about one and one-third miles in length, which was improved by lines of railway, tracks, sidings and switches, warehouses, freight and passenger depots. The capital stock of the corporation was one million dollars. The articles of incorporation limited the indebtedness to two-thirds of the capital stock, except such indebtedness as was secured by mortgage upon its property.

The trust deed in controversy was executed and acknowledged on the 1st day of January, 1890, covering and embracing all of the property the corporation then owned or

which might thereafter be acquired, securing bonds of the same date, to the amount of one million, two hundred and fifty thousand dollars ($1,250,000), and this trust deed was recorded with the recorder of deeds of Woodbury county, Iowa, on the 27th day of February, 1890, and the bonds were sold on the open market, at from ninety to ninety-five cents on the dollar and are all outstanding and unpaid.

All of the funds derived from the sale of these bonds were devoted to the legitimate uses of the Terminal Company. A portion was used in paying its floating indebtedness. Another portion was used in paying for and improving its property, and a small portion was used in paying interest upon its indebtedness.

The bonds were sold in Philadelphia and the proceeds of the sale remitted to the Union Loan & Trust Company and by that company placed to the credit of the Terminal Company, one million dollars of the bonds being sold shortly after the trust deed was recorded, and the remainder from time to time as needed for the construction of the buildings on the Terminal grounds.

Prior to the time of the issuance of these bonds and on the 14th day of December, 1889, the Terminal Company had executed a lease to the Sioux City & Northern Railroad company of all its property for a period of one hundred years, at an annual rental of ninety thousand dollars ($90,000), of which rental fifteen thousand dollars ($15,000) was payable directly to the Terminal Company, and seveny-five thousand dollars ($75,000) was to be paid to the trustee under the mortgage, the mortgage in controversy being then in contemplation, this sum of seventy-five thousand dollars being the amount of the annual interest on the one million two hundred and fifty thousand dollars of bonds, and the lease contained the usual provisions of forfeiture and reversion in case of non-payment of the rent provided. The trust

deed not only embraced the property of the Terminal Company, describing the lots and blocks by number, metes and bounds, but also included this lease which had before been executed as additional and collateral security.

During the fall of 1892 and the spring of 1893 the Terminal Company issued its notes to the amount of about seven hundred thousand dollars ($700,000), which were unsecured, and these notes were negotiated through the Union Loan & Trust Company to the various banks which are making this defense.

It does not appear from the record and I understand that it is not the fact that any of these banks held any of the notes of the Terminal Company prior to the fall of 1892. In the latter part of April, 1893, there was a general smash in these railroad properties and the Union Loan & Trust Company, being a large endorser, failed; and just prior to the failure a second mortgage was executed by the Terminal Company securing bonds to the amount of its then outstanding floating paper—about seven hundred and eighteen thousand dollars ($718,000). The mortgage was made to the Union Loan & Trust Company, trustee, and the bonds secured by it were deposited with the Union Loan & Trust Company as collateral, for the benefits of the banks which held this floating paper, it being expressly stated in the second mortgage that it was a second mortgage and was given subject to the first mortgage now in controversy.

In October, 1893, the First National Bank of Montpelier and ten other banks, being holders of the paper of the Terminal Company which was secured by the second bonds and trust deed held by the Union Loan & Trust Company, desiring to avail themselves of this security, filed their complaint in the circuit court, in their own behalf and in behalf of all other beneficiaries under the second mortgage, claiming that they were the equitable owners of the second mortgage on

the Terminal property, alleging the insolvency of the Terminal Company and the maturity of their obligations; and under this proceeding, had a receiver appointed; and in December, 1893, The Trust Company of North America intervened in that cause and alleged its right to collect the rentals under the terms of its trust deed, and an order was then entered giving to The Trust Company of North America the right to collect the rentals. Afterward, in April, 1894, The Trust Company of North America commenced its separate action against The Terminal Company, and all other parties interested, to foreclose the first mortgage because of default in interest on the coupons due the 1st day of January, 1894, and on an application to the circuit court to appoint a receiver under the first mortgage, an order was entered extending the appointment of a receiver already made to the first mortgage, and the case of the First National Bank of Montpelier et al. vs. The Terminal Company was consolidated with the case of The Trust Company of North America against the same defendants, and ordered tried as one cause.

In the meantime the First National Bank of Montpelier and other banks which held the floating paper of the Terminal Company, secured by its second mortgage bonds, had placed themselves in various attitudes of defense against the first mortgage.

As before stated, their first move was to commence an action of foreclosure on the second mortgage, which counsel now say has been practically abandoned but not abandoned of record. The second move was to obtain the control of the Terminal Company by procuring the resignation of its then directors and electing these creditors in their stead, and then to make conveyance of all the property to E. H. Hubbard, trustee; and then, as owner of the property, Hubbard, as trustee, interposes his defense, and being the assignee of the

Union Loan & Trust Company, he interposed a joint defense as assignee of the Union Loan & Trust Company, which was the trustee of the second mortgage. These creditors then organized themselves into a corporation known as the Credits Commutation Company by turning in the notes which they held of the various defunct institutions as assets and taking out stock of the Credits Commutation Company in lieu thereof; and this company then being the owner of the notes of the Terminal Company, brought a suit against the Terminal Company while it was yet in the hands of the receiver which they had appointed and after all its property had already been conveyed by them as directors to Hubbard, trustee, and in this suit a general judgment was obtained in the state court against the Terminal Company for the amount of the floating notes, without regard to the second mortgage security, and then as judgment creditor the Credits Commutation Company make the same defense as was made in the name of Hubbard, trustee, and whether operating in the name of Hubbard assignee, Hubbard trustee, the Terminal Company or the Credits Commutation Company, the interest was the same; and that is, the interest of the parties who held the notes of the Terminal Company which were secured by the bonds under the second mortgage.

DISCUSSION OF QUESTIONS SUGGESTED BY PETITIONERS.

The chief contention of counsel for petitioners is that the Terminal Company was prohibited from contracting indebtedness in excess of two-thirds of the paid up capital stock. Before arguing the legal question involved, I desire to suggest that these petitioners are in a poor situation to question the legality of the first mortgage on such a ground, for whatever might be said against the validity of the first

mortgage, could be said, with much more force, against the validity of their own holdings.

So far as the interests of the Credits Commutation Company are concerned, it is the holder of notes issued by the Terminal Company to various banks, made during the latter part of the year 1892 and the first part of the year 1893 (Record, pages 78–82), and it is not shown in the evidence, and I understand it is not the fact, that any of these banks held any indebtedness of the Terminal Company prior to that date. So far as the record shows, this indebtedness was all created after the bonds in controversy were issued, therefore, it necessarily follows that if any portion of the bonds was invalid because issued in excess of two-thirds of the capital stock, the same argument applies, with much greater force, to these notes held by the Credits Commutation Company, and there is certainly no court of equity which would allow them to perform the evolution of substituting themselves for the Terminal Company after the company had passed into the hands of a receiver, and then by consent obtain judgment against themselves in another jurisdiction, and by this means make a subsequent indebtedness prior in point of validity.

The manipulators of this deal were evidently afraid of the second mortgage security, for they now say that they will waive their security and depend upon this judgment obtained in the state court as the basis of their rights, and the reason for seeking to avoid this second mortgage is found in the terms of the morgage itself, where it provides "that the said premises are free from incumbrance excepting a deed of trust made on the first day of January, 1890, by the said party of the first part and the Trust Company of North America, of Philadelphia, to secure the sum of one million, two hundred and fifty thousand dollars ($1,250,000) of bonds, and the said party of the first part will warrant and defend

the title unto the said party of the second part, its successors and assigns, against all persons whomsoever lawfully claiming the same, *subject to the lien of the said prior trust deed.*" (Record, page 16.)

This clause would, of course, make it extremely difficult for any one to stand upon the mortgage containing it and assert the invalidity of the mortgage to which it was expressly made subject. Therefore, the defense interposed in the name of E. H. Hubbard, assignee of the Union Loan & Trust Company, which was the trustee named in this second mortgage, is practically abandoned in favor of the defense made in the name of the Credits Commutation Company; and the defense made in the name of E. H. Hubbard, trustee, is in no better position, for the instrument under which he holds is merely an amendment to this second mortgage, and to carry out the same purpose and effect. The instrument is found in full in the Record, pages 233–242, and it recites the fact that the mortgage was given for the purpose of securing this floating indebtedness to the Union Loan & Trust Company, and that the same objection is being made to its validity, that it is deemed desirable to carry out the intention of the company and secure the paper, and that Hubbard is a suitable person as trustee, and the second deed is made to him as trustee, but still made as security for the debt and not in payment of it, for the same notes which this second instrument was given to secure were turned over by the various holders to the Credits Commutation Company as unpaid obligations, and they were afterwards sued on in the state court and judgment obtained; therefore, it is apparent that it was not the thought of the operators to cancel the debt and accept the property in payment of it, but only to give an amended mortgage for their better security; and the position under this instrument is apparently also abandoned

in favor of the position of judgment creditor under the name of the Credits Commutation Company.

The history of these various maneuvers shows how earnestly these parties have attempted to put themselves into a position where the later indebtedness of the Terminal Company could be held valid and the earlier indebtedness could be held invalid, on the ground that the company had exceeded the indebtedness permitted by statute.

NEITHER THE TERMINAL COMPANY NOR ANY PARTY HOLDING UNDER IT CAN URGE THE PLEA OF ULTRA VIRES WHEN THE ACT WAS NOT VOID.

The argument of counsel for petitioners has proceeded upon the theory that the bonds and mortgage are void. Most of the cases cited have dealt with void contracts. This is the fundamental error in petitioners' position and if wrong in this, the entire argument has but little application.

If it were true that this contract is void a large number of decisions could be found which held to the doctrine that no recovery could be had upon it and that the recovery, if at all, should be had on a common count; but if the contract were only voidable, the reason for such a ruling would fail and it could not obtain. A void contract is dead and no equitable inclination could give it life. There is nothing there to enforce and the court is powerless to bring it into being; but a voidable contract may be valid under some conditions and void under others. The court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the court upon that question. It is not dead but simply in a position where, under some circumstances, it might be declared dead.

This distinction is wholly lost sight of in the argument of counsel for the petitioners, and it is the first question that ought to be settled in the determination of this case.

It is true that many acts of a corporation are void and especially when it is acting entirely outside of its capacity or authority and beyond the bounds and purposes for which it is created, and in all those cases where the law has declared such acts to be void the contracts made in violation of the law are void and not enforceable, as contravening public policy or in violation of charter rights or beyond the scope of express powers; but such is not the rule where the corporation has simply abused its general power and has gone beyond its prescribed authority in the line in which it was authorized to act. Such acts are voidable and not void.

If the corporation under the law and its charter has general power to do an act but in the doing of it certain rules and regulations are not conformed to, the act is voidable; but if the corporation engage in an occupation or undertaking in which it had no general power to act, or do any business, then its acts are *ultra vires*.

Under its charter and the laws of Iowa this corporation had the power to borrow money; therefore, in borrowing money it was acting within the scope of its powers and its acts could not be *ultra vires* in that respect; but if in the exercise of that act it violated the laws of the state or its charter, its acts in that respect might be voidable, and whether or not they would be declared voidable would depend upon the equities of the case and whether or not justice could be done to all parties under such a holding.

It will be observed that the statute of Iowa does not contain any provision making acts done in violation of it void, and this omission in the statute is significant and amounts to a declaration on the part of the law makers that this is a regulation for the guidance and control of

corporations and was not intended to operate as a fraud on the investing public or a trap for the benefit of scheming manipulators of corporations or as a bar to corporate business, by compelling all persons to investigate the affairs of a corporation before they do business with it, at their peril.

In this case the bonds were all sold on the open market and brought the good, round market price of ninety and ninety-five cents on the dollar, with accrued interest, and proceeds was all devoted to the uses of the Terminal Company and it received the full benefit of the sale of the bonds. (Record, page 89.) Therefore, a holding that these bonds are void, under these circumstances, would create a great injustice between the parties, and it is on this principle that the courts have refused to declare a voidable contract void.

Referring to an analogous case where the same principle was involved, the question turned upon the right of some banks to foreclose mortgages on property of the corporation where the debt secured by the mortgages was in excess of the charter limit, and objections were made to the foreclosure by the general creditors. In the opinion of the court it was said, "The mortgages were given to secure an indebtedness in excess of the amount of the debts the companies, by their charters, were authorized to contract, and it is said that this renders the evidences of the indebtedness, and the mortgages given to secure it, *ultra vires* and void, but on the face of this case this position cannot be maintained. The moneys were received by the companies and used in carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to have the repayment of their money and the companies could execute a valid security for its payment." Allis vs. Jones, 45 Fed. 148.

This case also decides the question raised by petitioners as to whether a judgment creditor is in any better position than his debtor to raise this question, and on that branch of the case it was said that "Skeen cannot be heard to urge this objection because he is not a creditor of the milling companies. Allis became such, if at all, after the indebtedness to the banks had been created and it would seem, therefore, as if he is in no plight to raise the question."

In a recent opinion by Judge Jenkins in the case of the Citizens Bank vs. Hawkins, 71 Fed. 370, the law is also very clearly stated: "An act is *ultra vires* a corporation when it is beyond and outside of the scope of the powers conferred by its founders when the corporation is without authority to perform it under any circumstances or for no purpose. Such acts are wholly void and no contract for their performance can be enforced by or against the corporation, the plea of *ultra vires* being available to either party to the contract. Such was the character of the agreement under consideration in

Thomas vs. Railroad Co. 101 U. S. 71.

Central Trans. Co. vs. Pullman Co. 139 U. S. 24.

There are, however, acts done in excess of conferred powers, illegal as to the shareholders but for which the corporation is liable to innocent parties. As, for example, where the corporation is authorized to perform an act for a specific purpose and performs the act for another and unauthorized purpose. In such a case the plea of *ultra vires* is available to neither party.

Such was the character of the contracts under consideration in

Union Gold Mining Co. vs. National Bank, 96 U. S. 640.

Smith vs. Sheely, 12 Wall, 358.

Bank vs. Matthews, 98 U. S. 621.

Bank vs. Whitney, 103 U. S. 99.

Bank vs. Stewart, 107 U. S. 676.
Fritts vs. Palmer, 132 U. S. 282.
Bank vs. Townsend, 139 U. S. 67.
Thompson vs. Bank, 146 U. S. 240.
Bank vs. Butler, 157 Mass. 548.
Ditch vs. Zellerbach, 37 Cal. 543.

The case of Wood vs. Cory Waterworks Co. 44 Fed. Rep. 147, seems to be in all respects similar to the case at bar. There is the same limitation to the right to incur indebtedness. The same transaction where one party exceeded the limit and the same plea of *ultra vires*. On page 151 Judge Acheson says: "If the construction contract, as a whole, offended against the constitutional and statutory provisions here invoked, the corrective power resides in the commonwealth, which alone can now complain of the completed transaction. *Appeal of Columbia Nat. Bank, supra*. This principle, which indeed is decisive of the entire case, was recognized as sound, and was enforced in Bank vs. Matthews, 98 U. S. 621, where a mortgagor sought to enjoin a sale of the mortgaged premises under a power contained in the mortgage, on the ground that it was taken in violation of the national banking law; and in Fritts vs. Palmer, 132 U. S. 282, where a foreign corporation had purchased land, and taken a conveyance thereof in direct violation of the laws of the state in which the land was situated, it was, nevertheless, held that the corporation took the title as against its grantor, and his subsequent grantee, and that it was for the state alone to question the validity of the deed of conveyance to the corporation."

In the case of Campbell vs. Argenta Gold & Silver Mining Co. 51 Fed. 1, Knowles judge, reviews the authorities on the question of *ultra vires* at great length, distinguishing between those acts which are void and those which are merely voidable, and in a case where the statute of Montana provided that the officers of the Mining Company should not

mortgage its property except in pursuance to the order of the stockholders' meeting, convened by the publication of notice, and the mortgage was given without such notice and without such meeting, it was held that it was, at the most, voidable and not void; and he says, on page 9: "This court feels bound by the rule expressed in Railway Company vs. McCarthy, 96 U. S. 258, and in accordance with it would have to hold that even the corporation and stockholders in this case would be estopped from asserting that the mortgage was void, although it might be held that it was beyond the power of the corporation to execute the same. But holding, as I do, that the mortgage was only a voidable contract, I have no difficulty in maintaining that the corporation and stockholders in this case would be estopped from denying its validity. The bonds sued on in this case were the consideration for the property embraced in the mortgage; neither the corporation nor the stockholders have ever expressed any desire to disaffirm that contract. The contract was entered into with the knowledge of the stockholders; the corporation have held and enjoyed the property so obtained; hence, it would be a wrong to allow the corporation to disaffirm this mortgage, and, if neither the stockholders nor the corporation could now object to this mortgage, much less could the creditors of the Argenta Company object to the validity thereof."

STATUTE CONSTRUED BY THE SUPREME COURT OF IOWA.

This statute has been construed many times by the supreme court of Iowa, and it is held to be a mere regulation for the government and control of the corporation by the authorities of the state, and that it was not intended to permit corporations to defraud their creditors, and that

the courts would not use it to work an injustice between the parties.

Humphrey vs. Patrons Society, 50 Iowa, 607.
Garret vs. Burlington Plow Co. 70 Iowa, 697.
Warfield vs. Marshall County Canning Co. 72 Iowa, 666.

Recognizing the unanimity of these decisions, and in a vain endeavor to avoid their force, counsel for petitioners have urged an argument that the Terminal Company was not a private corporation, but was a *quasi* public corporation, and therefore, that a different rule obtained, and urge that the rule of the county bond cases would be more applicable; but there has been no attempt made to show that under the laws of Iowa, the Terminal Company was not a private corporation for pecuniary profit, and it could not well be urged because the section of the statute upon which counsel relies to defeat the mortgage applies only to private corporations and as he must contend that this limitation is applicable it necessarily follows that he cannot deny the Terminal Company is a private corporation, within the meaning of the chapter. As soon as he proves to the satisfaction of the court that this Terminal Company was not a private corporation organized for pecuniary profit, with the same proof he thoroughly establishes the fact that the section upon which he relies to defeat the mortgage has no application. A reference, however, to the laws of Iowa shows how vain such a contention must be for the statute makes no distinction between railroad and other private corporations. They are all organized under the same general statute and one corporation may have as many different lines of business as it sees fit to reserve to itself. It may own a railroad and run a mercantile business if it so desires, and its public duty does not restrain it from carrying on its private business.

The statute of Iowa, McLain's Code, sec. 1608, provides: "Any number of people may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction, ownership, operation and maintenance of canals, railways, bridges or other works of internal improvement, and the purchase, ownership, operation and maintenance of any railroad sold or transferred under power of sale or foreclosure of any mortgage deed or trust; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

The Terminal Company was organized under this section and is controlled by the provisions of the chapter following.

There is no logical reason assigned, and no authorities cited, to support the proposition that estoppals cannot be urged against a *quasi* public corporation, and there is no authority cited holding that the rule of the county bond cases applies to railroad corporations. Railroads are private corporations and not public in any sense. The term "*quasi* public" has been applied to them because the public retains some kind of control over their actions and they have certain rights and privileges granted and certain duties are imposed upon them, but in every characteristic in which these cases could call for a distinction they are essentially private. They are incorporated for pecuniary profit and managed and directed by their stockholders. Their books are not open to the public and the public is not particularly interested in their pecuniary welfare. They have their officers and directors to act for them and contract for them and bind them by such contracts.

A different rule applies to purely public corporations based on reasons which could not apply to private corporations, dictated from public policy and with the motive of guarding the interests of the public. In dealing with a

public corporation not only its powers and limitations are well known, but the public records disclose all the facts. The amount of public indebtedness can be ascertained from an examination of the public records and, therefore, there is every reason to charge a person doing business with a public corporation with knowledge of the condition of its affairs. Not only this, but the officers of a public corporation do not stand in the same relation to it that the officers and directors of a private corporation sustain. The officers of a public corporation have well defined duties. Their powers are limited by the law that creates them. They have no authority whatever to exceed those powers, and the power is not granted to them to estop the public from asserting its rights and remedies by their official acts; while in the case of a private corporation all its affairs are entrusted to the directors and officers. It is the only way the corporation has of acting and their powers are not limited but they are given full scope and discretion to do whatever might be best to do for the interest of the corporation and, therefore, the corporation is bound by the acts of those who are empowered to act for it.

THESE BONDS BEING SECURED BY A MORTGAGE UPON REAL ESTATE, COME WITHIN THE EXCEPTION OF THE IOWA STATUTE AND ARE, THEREFORE, VALID.

Judge Shiras in Circuit Court held that the statute relied on by Petitioners did not apply to these bonds in controversy because they were secured by an actual transfer of real estate, and this is undoubtedly the plain exception of the statute, although counsel for Petitioners have sought to show, by statements not supported by the record, that the history of this section of the statute would give ground for

the belief that it was not intended to apply to this class of bonds but only to apply to debenture bonds which were secured by the hypothecation of notes secured by a mortgage, but it would seem to be just in the construction of such a statute that the burden should be placed upon the party trying to avoid an honest debt to show by clear and unequivocal language that the act complained of was actually prohibited by the laws of the state and as the section is, in itself, a limitation upon general powers most freely granted, it should be strictly construed; and it would also seem that in the construction of such a statute the plain and ordinary meaning of the language used should be adopted and that previous history, even if true, could not be used to change the meaning of the plain and clear proviso.

If the statute had provided that only debentures were excepted from its terms, there might be some ground for the contention that these bonds were not debentures within the meaning of the term, but the provisions of the statute is not limited to debentures but provides that "debentures or *bonds*" are excepted when they are secured by an actual transfer of real estate securities.

The only room for a quibble is the use of the word "securities" in the plural instead of "security" in the singular, indicating that more than one security was demanded. If the section were to read "and secured by the transfer of real estate security" there could be no possible question over the meaning, for a mortgage is certainly real estate security; but the use of the plural might be said to indicate the requirement of more than one security; but it so happens in this instance that the mortgage does embrace many separate and distinct pieces of property, consisting of lots and blocks in various parts of the city, franchises tracks and depots, which are all pledged as security for the payment of bonds,

equally and ratably, so that the mortgage in controversy not only comes within the spirit of the section, but within its letter.

It is suggested by counsel in argument that such a construction is against public policy, but it is difficult to see why the same policy should not apply to all corporations which secure their indebtedness with real estate. There seems to be no good ground of public policy which would distinguish and say that one corporation might secure its indebtedness by real estate while another could not, or that one might secure its indebtedness by real estate up to a certain amount and another might to any amount; and certainly it would seem ridiculous to contend that a corporation had no power to issue its bonds and secure them by a trust deed on real estate, when it could issue the same bonds with the same security and use them as collateral for loans to any amount. The same ground of public policy applies to all corporations dealing in real estate. The limitation of indebtedness of corporations generally is based on good, sound public policy for the protection of the stockholders as well as of the investing public. The stockholders not being liable for the debts of the corporation and the directors not being liable, there is also a tendency to increase the debt and take many chances of being able to make payment, and this is, no doubt, detrimental to the stockholders and often times dangerous to investors, as they have no means of knowing the amount of the debt created; but where the debt is secured by real estate mortgage on property worth double the amount of the debt, the investor is safe and the stockholder must be reasonably safe in the ownership of the property given for security and, therefore, there seems to be good reason for making the exception in favor of this class of securities, but the same reason would apply to all corporations. There could be no question of public policy that would affect

one, which would not, with equal force, apply to another, and the state itself, and its law makers, must be the judges of what is the best public policy to adopt.

THE REAL ESTATE MORTGAGED WAS ACTUALLY WORTH DOUBLE THE AMOUNT OF THE BONDS.

It has also been suggested that the bonds in controversy, secured by trust deed, do not come within the exception of the statute because the property embraced in the mortgage was not of sufficient value.

The statute provides "such securities to be at least equal in amount to the par value of such bonds or debentures and to be first liens on unincumbered real estate, worth, at least, twice the amount loaned thereon," and it is claimed in argument that the real estate is not worth twice the amount loaned thereon.

It must be the law that the petitioners, making this contention, should prove to the satisfaction of the court that the real estate was not worth twice the amount loaned thereon, for they are the parties who are seeking to show the violation of the law on the part of this corporation. The burden is on them to show a violation. Every step or act necessary to show a violation should be proven by them.

The presumption is that there was no violation of the law; that the officers of this corporation did their duty. The presumption of innocence obtains, and the petitioners have the burden of showing a violation of the law. If, in order to show a violation of the law, it is necessary to prove that the real estat embraced within the mortgage was not worth twice the debt, they have the burden of showing it; and yet, having this burden, they fail to introduce any testimony on the subject, and they have not even a presumption in their aid, for the presumption is that the security was amply

sufficient to secure the bonds, or they would not have sold for their full value on the market; but not content to rest upon a presumption, the respondent introduced evidence upon the subject. Not a great deal, it is true, but it introduced the testimony of one credible witness whose statements have not been gainsayed.

Mr. Garretson testified (Abstract, page 92), in answer to the question as to what the property embraced in the mortgage was worth in 1892, when the last two hundred and fifty thousand dollars of the bonds were sold: "With the buildings and all complete it was worth two and a half million dollars. Couldn't be duplicated at that time for that amount of money—for twice that amount of money, outside of itself, in the city."

This was the only testimony introduced on the subject of values, and, being undisputed, it should be accepted as proving the fact; and the fact being proven, there remains nothing to the argument of counsel.

THE REAL ESTATE MORTGAGED WAS NOT INCUMBERED WITHIN THE MEANING OF THE STATUTE.

It is claimed by counsel for petitioners, in argument, that the mortgage in question does not come within the exception of the statute because the property was previously incumbered.

The statute provides: "Such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate, worth at least twice the amount loaned thereon;" and it is claimed that as a lease had been executed by the Terminal Company to the Sioux City & Northern Railroad Company prior to the date of the execution of the bonds, it created an incumbrance on the property so that the property could not be regarded as unincumbered property; but a very brief re-

view of these two instruments, the lease and the mortgage, will show that it was not the intention to create a prior incumbrance, but that the two instruments were executed as one transaction. The lease referred to provides (Record, page 158): "And, whereas, the said Terminal Company, party of the first part, has been vested with power, by the stockholders and board of directors, to execute and deliver, and will execute and deliver, its first mortgage to The Trust Company of North America, of Philadelphia, Pennsylvania, to secure an issue of bonds to an amount not exceeding one million, two hundred fifty thousand dollars ($1,250,000), which mortgage is to cover, embrace and include all of the real estate of said Terminal Company, and all the rights of way, franchises and all rights acquired or to be acquired under and by virtue of the said ordinances, assignments and transfers aforesaid; and,

"Whereas, It is further provided in said mortgage under said power given as aforesaid, that so much of the rental in this lease provided as shall be necessary to pay the interest upon said bonds and the necessary cost of trusteeship, shall be paid in quarterly installments to the trustee in said mortgage named."

And referring to the mortgage (Record, page 148, the third paragraph thereof) it will be noticed that the mortgage covers and embraces the lease which is assigned as additional security to secure the payment of the bonds and providing that the mortgagee shall have all the rights and remedies of the mortgagor in case of non-payment or default, with the right to enforce a forfeiture in case of non-payment or a violation of any other provisions of the lease

It is evident that these two instruments were considered as one. That the lease was executed for the better security of the bonds and that instead of being a prior incumbrance upon the property it was an additional value to the mort-

gage security. The phrase "prior incumbrance" has reference to a prior adverse interest which lessened the security and could not apply to such an instrument made and created for the purpose of adding to the security and which did actually have that effect. Although there is a difference of a few days in the dates of the two instruments, each had reference to the other, and the rental under the lease being payable to the mortgagee under the mortgage, could not take effect until the mortgage was created. In fact, it was no lease until the mortgage was made because there was no recipient for the rental.

THE TERMINAL COMPANY HAD A RIGHT TO MORTGAGE ITS PROPERTY AND FRANCHISES, AND ITS RIGHT TO DO SO IS NOT QUESTIONED IN THE ISSUES.

It has been elaborateiy argued before this court that the Terminal Company had no power to mortgage its property or its franchises, but there is no issue in the case upon which to base such an argument. The answers of the parties are quite fruitful in the number of reasons assigned why this mortgage should not be foreclosed and why a floating debt should be preferred to a mortgage debt, but this was not one of the reasons assigned in the various answers filed (see Answer, Record, page 44; Answer, Record, page 49; Amendment to Answer, Record, page 53; Amendment to Answer, Record, page 58), and it is a question which was not presented to Judge Shiras nor touched upon in his opinion and, therefore, should not be argued here; but for the purpose of argument, treating the matter as open for discussion, I think I can safely say that there is no warrant in the statute of Iowa for counsel's contention. There is a great deal said in the course of his remarks about rail-

road corporations and corporations for pecuniary profit and other private corporations, but there is no such distinction made under the statute. There are no provisions of law for an incorporation of railroads different from any other corporation for pecuniary profit. They are all organized under section 1 of title IX of the Iowa Code, and there is no prohibition against any corporation organized under that chapter from engaging in any line of business that may seem profitable, or engaging in various lines of business under the same corporate existence.

There is no inhibition in the law against a corporation being organized for the purpose of building a railroad from point to point, in Iowa, and at the same time engaging in the business of buying and selling coal and grain and erecting elevators and warehouses for that purpose; nor from the business of handling live stock, or any other enterprise that they might wish to carry on. That is, under the law, a corporation does not need to be of an exclusive character, simply carrying one line of business; and the law being this broad, the articles of incorporation of this company are warranted under it, and it reserves to itself the right and power to build railroads, to acquire and develop terminal grounds, build the necessary side tracks, switches, and to erect freight and passenger depots, elevators and warehousee, and other lines of business in connection with it; so that this corporation, under the laws of Iowa, had a multiplicity of business to carry on, and various kinds of property included in its ownership.

The franchises which were granted to it were for the particular purpose of enabling it to build its lines of railway, side tracks and switches over the streets and alleys of the city, and belonged to the railroad branch of the business; therefore, whatever right a railroad company has in Iowa to mortgage its fanchises inure to this company, and the fact

that it had other properties and other enterprises and lines of business would not deprive it of the right granted by the laws of the state in connection with its railroad work.

The statute does not say that any corporation engaged exclusively in a railroad enterprise shall have the power to mortgage its franchises, but is much broader in its terms, and covers and embraces all corporations organized under the laws of Iowa and engaged in owning or operating a railroad.

Section 1965 of McLain's Code of Iowa, after providing for the issuance of bonds by corporations, provides: "Such corporation may also secure the payment of said bonds by executing mortgages or deed of trust of the whole or any part of its property and franchises."

It has been suggested that it would be dangerous to claim the protection of this statute for the reason that the law limits the right to mortgage a railroad to sixteen thousand dollars a mile; and perhaps if this corporation had no other property than the railroad, there might be some force in the argument; but as this corporation had real estate worth two and a half million dollars, and only a small piece of railroad, it is quite apparent that the statute limiting the amount that might be placed upon the railroad could have no application to its other property.

The only franchises the corporation had, were, as before stated, the right of way of certain streets and alleys in the city, for the purpose of building this piece of railroad, and the mortgage does not purport to cover the franchise of the company's own existence, but simply the franchises for the right of way granted by the city.

It is said that the Terminal Company has no right to mortgage its franchises because that right was not reserved in the articles of incorporation, and it is true that the articles of incorporation do not expressly grant this power,

but the power of a corporation in Iowa is somewhat different from that of many states. Here there is no charter granted enumerating certain powers, and there is no law requiring the articles of incorporation to enumerate all the powers which the corporation shall possess.

An examination of the Iowa statute, being chapter 1 of title IX of the Code, will show how liberal the Iowa law is in the formation of corporations. All the articles of incorporation need state is that the incorporators do associate themselves together as a corporation, under the laws of the state, stating the general object, duration, capital and limits of indebtedness. The law requires the notice to be more specific. (Sec. 1613 of the Code.) It must contain the name, the general nature of the business, the amount of capital stock, the time of commencement and termination, what officers and persons the affairs are to be managed by, the highest amount of indebtedness, whether private property is exempt, etc.; but the law nowhere requires either the articles or the notice to state the specific powers which the cororation shall enjoy. These are governed and controlled by the law and not by the incorporators, and the law is all embraced in the last clause of section 1608, where it says, "but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided"; and under this section the Iowa courts have held that corporations are possessed of all the powers necessary to carry out the object of their existence in the same degree as natural persons.

The corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry the purpose of its existence.

Home Ins. Co. vs. N. W. Packet Co. 32 Iowa, 223.

For the purpose of effecting the objects of a corporation its powers are as broad and comprehensive as those of an

individual unless the exercise of the asserted power is expressly prohibited.

Thompson vs. Lambert, 44 Iowa, 439.

A corporation has, by implication, the authority to borrow money and execute notes and mortgages, if it is not expressly prohibited. *Ibid.*

The power to mortgage the property of a corporation is incident to the ordinary powers of such corporation.

Dunham vs. Isett, 15 Iowa, 284.

Where the articles of incorporation of a company prohibit a debt of any amount in excess of $25,000, bonds to the amount of $75,000, secured by trust deed, are sustained in the hands of innocent purchasers, on the theory that the corporation had the right to borrow money and that these articles of incorporation were simply regulations for its own control and could not be used to operate against *bona fide* creditors.

Des Moines Gas Co. vs. West, 50, Iowa, 16.

All these decisions go to show that under the laws of Iowa the articles of incorporation are not as strictly construed as a charter, and that the rights, obligations and limitations of a corporation are not strictly confined to the articles. The general objects and powers of a corporation being stated, all other powers necessary to carry out those general powers are granted by implication and need not be specifically mentioned.

THE TERMINAL COMPANY HAS DIRECT AUTHORITY, UNDER THE STATUTE, TO MORTGAGE AFTER ACQUIRED PROPERTY.

Another objection of the petitioners to the validity of this mortgage is that the Terminal Company had no authority to mortgage after acquired property, and it is

said, in argument, that the authority granted by the statute of Iowa, (sec. 1866 of McLain's Code) only applies to railroad corporations, but if it did I would need go no further to find authority, for this Terminal Company is, among other things, a railroad corporation—that is, it owns a piece of a railroad. The general object of its incorporation, as stated in the articles and the notice, was, among other things, to own and operate railroads. These few after acquired lots were a part of its right of way, and, therefore, the right to mortgage these after acquired lots is fully covered by the statute; but even if it were not and there were no statute on the question, there is no law or public policy which would prevent a corporation from mortgaging property to be acquired; and if the mortgage were given embracing property which the corporation did not own, I have no doubt that the subsequent purchase of that property would inure to the benefit of the mortgagee the same as the after acquired title of a grantor inures to his grantee under a previous warranty.

THE PETITIONERS ARE NOT IN POSITION TO URGE PLEA OF *ULTRA VIRES* IN THIS CASE.

A large part of Petitioners' brief is devoted to the question of *ultra vires* and while I feel that it is wholly unnecessary, if not improper, to devote further time and space to this question, as it has so often been analyzed by this court and others, yet perhaps a brief review of some of the authorities may not be improper.

As I have before remarked, these Petitioners have sought in every conceivable way to place themselves in some position where they could be heard to urge the plea of *ultra vires*, but under whatever name they may style themselves, or whatever may be the form of the lien they secure—whether it is a second mortgage, or a second trust deed, or a judg-

ment lien—the one bald fact always remains controlling, and that is, that their indebtedness was not created until more than two years after the trust deed in controversy was recorded, and therefore they have no right to complain —no more or better right than the Terminal Company itself —for when their indebtedness was created our mortgage was in existence and the public records disclosed the fact. They placed their money with full knowledge of the situation. They were bound to know that the property of the Terminal Company was bonded and having placed their money while their debtor was in this situation, they cannot afterwards be heard to change it to any other or further extent than the Terminal Company could be heard.

This case in this respect is analagous to those cases where the debtor has fraudulently disposed of his property, with intent to defraud his creditors. His prior creditors can complain because they have some interest in the matter as a part of the property which may have induced them to make their advancement has been taken beyond their reach, but a subsequent creditor has no right to complain for he is bound by the situation in which he found the matter. This seems to be the rule, except in cases where the debtor disposed of his property with the intent to defraud those to whom he expected to be made indebted.

Graham vs. R. R. Co. 102 U. S. 153.

See, also, *Porter vs. Pittsburg & B. Steel Co. 7 Sup. Ct. Rep. 754.*

The question then turns as to how far a corporation can be heard to urge its own wrong and reap an advantage thereby. To plead to a court to do an act of injustice to its creditors. To invoke the aid of the law to legalize a steal from innocent parties. To trade upon its powers and play hide-and-seek with its creditors. I assert the proposition that where a contract has been wholly performed by both

parties and it is within the scope of the general powers of the corporation, no court of respectability in this country has ever decided that a contract would be declared void and an injustice created.

The leading case of modern times, is the case of The National Bank vs. Matthews, 98 U. S. 621, which is a case where a bank sought to enforce a real estate mortgage taken in direct violation of the statute.

In this case a number of analogous cases are cited and reviewed, and Justice Swayne, on page 629, says: "We cannot believe that it was meant that stockholders and, perhaps, depositors and other creditors should be punished and the borrower rewarded, by giving success to this defense whenever the offensive facts shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." And he cites with approval, this extract from Sedgwick (Stat. and Const. Constr. 73): "Where it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

The same rule has been applied whether the corporation was seeking to avoid the contract in violation of law or whether the person dealing with the corporation was seeking to avoid his liability because the contract was in

violation of the law. The authorities recognized this principle as being the same.

In construing this National banking law, this court places great stress upon the thought there was no penalty prescribed for a violation of the law, and says it cannot believe that congress intended that the contract should be void if made in violation of it, because it would have been so easy to say so, and the fact that congress refrained from saying so led the court to believe that the only penalty which should attach would be the forfeiture of the charter under which the bank was doing business, and this thought of the majority of the court has a material and important bearing upon the construction of the statute under consideration, because the language of the statutes are very similar.

This decision of the court is fully adhered to in the case of National Bank vs. Whitney (103 U. S. 101); and these cases are very important in another aspect of the case; that is, that there was no innocent party asserting the estoppal. All parties to the contract had equal knowledge and equal opportunity for knowledge. They were in *pari delicto*. The same rule and the same line of reasoning has been applied by Justice Brewer under a similar statute and similar facts, where all the parties were cognizant of all the matters, refering to the case of *Poole vs. West Point Butter & Cheese Association* (*30 Fed. Rep.*), where on page 520, he says: "One other matter is suggested, and that is the illegality of the increase of the stock from $25,000 to $250,000, and the limitation both in the statute of Nebraska and in the charter of the company against the amount of indebtedness. The complainants hold only stock which was thus irregularly issued, and I do not think it lies in their mouth, or, indeed, in the mouth of any of the original stockholders cognizant of the fact, and assenting thereto, to question the liability of the corporation for the entire debt

created in favor of the Middletown Bank. No man can plead his own wrong to defeat an honest debt. I shall therefore have to find against the claim of the complainant to priority of payment over the cross-complainant." And in the analagous cases arising in the supreme court of the United States, where the statute of the states prohibit a foreign corporation from owning or acquiring title to lands within its borders, the courts say that while such contracts are in violation of the law, they are not void, and only the state can take advantage of it, and in support of this doctrine they cite the case of Bank vs. Matthews (98 U. S.) above quoted, and other cases of a similar nature.

See Fritts vs. Palmer, 10 Sup Ct. Rep. 93.

And in the analagous cases where the statute of the state prohibits a corporation from entering into a contract until the articles of incorporation were filed, the supreme court of the United States say the restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff and he has no right to raise the question of its invalidity, citing again the case of Bank vs. Matthews.

In a case where a railroad issued its own bonds to its own stockholders, in violation of the law, because issued without consideration, Judge Wallace quotes with approval this extract from the case of Parish vs. Wheeler (22 N. Y. 494): "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. If an action cannot be brought directly on an agreement, either equity will grant relief or an action in some other form will prevail"; and Judge Wal-

lace further said: "The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation to repudiate its indebtedness to its creditors without offering to return the property it acquired by its unauthorized contract with them. A fundamental maxim is 'That he who seeks equity must do equity.'"

Memphis & L. R. Co. vs. Dow, 19 Fed. Rep. 389-394.

If such an attempt is considered audacious by the courts, what would be said of the attempt of these petitioners in their endeavor to subrogate themselves to the rights of *bona fide* holders of first mortgage bonds, bought and held in good faith for over two years before these petitioners loaned their money on the security of the equity in the property? Such affrontery is so unfamiliar to the courts that it has not yet been christened.

In an able opinion by Judge Cooley in the case of Day vs. Spiral Spring Buggy Co. (23 N. W. Rep. (630), on page 630, he says: "It is to be observed that the contract, though void in law, involved no element of criminality and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal and immoral action. The plaintiff had a right to sell her manufacture and to be paid for it. The defendant has received something of value from her and there is manifest equity in its being required to make payment notwithstanding it exceeded its power in the purchase."

In Beach on Corporations (section 424): "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith performed by the other party and the corporation has had the full benefit of the contract."

In the case of Manchester R. R. vs. Concord R. R., in the supreme court of New Hampshire (20 Atlantic Rep 383) in

a case where a railroad company brought suit for an accounting and for the recovery of a large amount of rolling stock and other property, the defense was made that the contract was *ultra vires* and wholly without the authority of either corporation. The court says: "The defense sought is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it only need be said, in equity at least, neither party to the transaction *ultra vires* simply will be heard to urge its invalidity while retaining its fruits. However the contractile power of the defendants may be limited by its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through the unauthorized contract; nor, as a corporation, is it exempt from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."

Morawetz in his work on Corporations (sec. 666) says: "The intention of the legislature must always be sought for in deciding upon the legal effect of the words contained in the law or charter; and unless it appears that the legislature intended to render a forbidden act or contract absolutely void in legal contemplation, it will not be so held."

Now applying this rule to the statute under consideration, it will be observed that there is no penalty attached to a violation of it, much the same as the national banking act, providing that a bank should not take real estate except under certain specific circumstances. There is no provision following which says that the act or contract or obligation shall be void, and therefore, under this rule, the courts will not declare such contracts to be void. If it does not so provide, the contracts are valid, if they have been executed by one of the parties, and in such cases only the state can interfere.

In constraing this statute it should be remembered that the whole trend of modern authority is in the direction of justice and equity between the parties. Every modern case is a protest against the ancient law of *ultra vires*. The doctrine was pernicious in all of its effects. It was simply a legalized cover for theft which would enable corporations acting under intricate charters to lawfully steal from the people who did business with it.

I respectfully urge that the construction and interpretation given to this statute by the supreme court of Iowa is entitled to great consideration. It is fair to presume that the supreme court of the state has some knoweldge of the intention of its legislative branch in making these laws, and have some judgment as to the policy of the state in dealing with its corporations; and the judgment of the supreme court of Iowa on the question as to whether this section was intended to be a guide for the regulation of corporations, and a weapon in the hands of the officers of the state to compel certain lines of conduct, or whether it was intended as a shield for corporations to avoid their just indebtedness, should be of great value. And in the absence of controlling reasons to the contrary, ought to be almost a guide for the judgment of this court, for such construction and interpretation by the highest court of the state it might be said, almost becomes a part of the statute itself.

In the cases before cited, from the supreme court of Iowa, this question was squarely decided. In the case of Humphreys vs. Patrons Association, 50th Iowa, 610, in which an agent for a corporation advanced money for the corporation in excess of its legal limit, Judge Rothrock says: "In our opinion, however, the limit imposed by the amended articles upon the company's power to contract indebtedness, would not necessarily have the effect to exempt the company from liability for indebtedness assumed to be contracted in excess

of the limit. It has been held, it is true, that a municipal corporation is not liable for indebtedness assumed to be contracted in excess of the limit. Carter vs. City of Dubuque, 35 Iowa, 416. But we know of no case where a private corporation has not been held, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed in the articles of incorporation. There is good reason for making a distinction between municipal and private corporations in this respect."

This case was followed in the case of Garrett vs. Burlington Plow Co., 70 Iowa, 697. This was a case where the directors of a corporation brought suit against it for indebtedness in excess of the statutory limit. The court, in the statement of facts, on page 699, say: "The directors, with knowledge of the existence of corporate debts beyond the limit prescribed by the articles of incorporation, and the insolvency of the company, and knowing that the other creditors, who had given it credit in ignorance of these things, were pressing their claims, caused the mortgage in suit to be executed in order to indemnify themselves."

In this case the counsel for the defendant conceded the ordinary doctrine of *ultra vires*, but claimed the directors who had acted for the corporation in creating the indebtedness could derive no benefit or advantage from their mortgage. But the court held that as no fraud was alleged the claim was a valid one in their hands.

These two cases are also followed in the case of Warfield vs. Marshall County Canning Company, 72d Ia., 666. There would seem to be no ground upon which the case at bar can be justly distinguished from these cases. In these, the parties were fully acquainted with all the facts, and in neither of these cases did they stand in the relation of innocent holders for value without notice, having full knowledge of all the matters; and the supreme court have held them entitled to

recover; and again, they have been held entitled to recover on their respective contracts, and they were in no case relegated to an action for money had and received, and the mortgage security was enforced.

But it is very strenuously urged by counsel, that the Credits Commutation Company, one of the petitioners, is in better position to urge the question of *ultra vires* than the mortgagor would be, and in better position than they would be as second mortgagees. But on what principle of law or logic this position is founded, I have not been able to discover. As before pointed out in the statement of the case, this Credits Commutation Company is simply a creature of the occasion; it is new in name, but old in experience; it is a new dress on the same old house. This company paid nothing for the notes, except its stock, and its stock was no better than the notes it bought. The holders of the notes, before they took on their new name, had commenced this suit by trying to foreclose their second mortgage; and without dismissing that case, and still holding on to the receivership which they obtained by commencing that case, and any other incidental advantages which they might reap therefrom, they now try to abandon their first proceeding, and the security with it, without dismissing, and come out in a brand new dress, claiming to be innocent, and, forgetting the past, endeavor to plank themselves in the position of *bona fide* holders.

It is plain that in equity this concern can have no better standing than the Terminal Company under which it holds.

As a judgment creditor, whatever of title it has, must came through the judgment debtor. And in a warfare against a prior mortgagee its fight must be based wholly upon the fight which the mortgagor could make. Getting on these new stilts may raise them higher in the air, but give them no firmer foundation.

Darst vs. Gale, 83 Ill. 136.
McAllister vs. Plant, 54 Miss. 106.
R. R. vs. Cowdry, 11 Wall. 459.
Herman on Estoppal, page 1316.

Counsel for petitioners have never before had sufficient courage to claim that any equity existed in favor of their clients; and have never yet disputed the proposition that the real equity of the controversy was with the respondent. As was stated in their oral argument, they base their right to recover on the limitation of the law, and not upon their equities; nor could they well claim equity, for the respondents, with the care of prudent business men, placed their money on mortgage security, which they placed on record in the proper place, and did all things which the law required them to do to protect their mortgage lien, while the petitioners, with more courage and less circumspection, trusted their funds on the unsecured paper of these financial boomers at a greater rate of interest, but without tangible security; and now, when it becomes apparent that the decreasing values compels some one to lose, they come into a court of equity, without showing equity, asking that the mortgage security of the respondents be abrogated for their benefit.

THE OFFER.

The so-called offer of Petitioners, presented for the first time in Petition for Rehearing in Circuit Court of Appeals, proposing to pro rate with Respondents in the first mortgage lien, is difficult to understand from a legal standpoint.

If the Respondent's mortgage is valid under the law, there would seem to be scant ground upon which petitioners could claim any benefit under it, inasmuch as their claims were created two years subsequently.

If the mortgage were held invalid, there would be no necessity, in the present action, of determining the respective equities of the parties.

In an appropriate action the amount of the legal debt could be determined, and the rights of the respective holders protected.

Counsel for petitioners claim that in this offer they are proposing a great bargain, which it would be well to accept before conditions modify their position.

This practice appears to be novel at least, and after considerable research we are unable to cite authority as to its effect. If permitted, it would seem to a large degree to obviate the necessity for evidence and books, for all the court would require would be the respective bargains of counsel, and then award decree to the most successful trader.

Upon the whole case, the Respondent submits that the Petition is without merit, and there are no questions involved presenting a conflict of decision, or matter of public importance.

It is respectfully submitted that the petition should be denied.

Asa F. Call
Joseph H. Call

Counsel for Respondent.

Office Supreme Court U. S.
FILED
JAN 19 1899
JAMES H. McKENNEY
Clerk

No. 192.

Brief of Call & Call for Appellee

BRIEF OF APPELLEE.

Filed Jan. 19, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 192.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, and E. H. HUBBARD, Assignee of the UNION LOAN & TRUST COMPANY, *Appellants*,

vs.

THE TRUST COMPANY OF NORTH AMERICA, *Appellee*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ASA F. CALL, Sioux City, Iowa,
JOSEPH H. CALL, Los Angeles, California,
Solicitors and Counsel for Appellee.

In the Supreme Court of the United States.

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SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY,
CREDITS COMMUTATION COMPANY,
E. H. HUBBARD, Trustee, and E. H. HUBBARD, Assignee of the UNION LOAN & TRUST COMPANY, *Appellants*,
vs.
THE TRUST COMPANY OF NORTH AMERICA, *Appellee*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

As Appellants' statement is incomplete and in some respects inaccurate, we make a brief statement of facts disclosed by the record.

This suit was brought by the Appellee to foreclose a mortgage for $1,250,000.00 given by the Sioux City Terminal Railroad & Warehouse Company on the 1st day of January, 1890, covering properties in Sioux City, Woodbury County, Iowa, known as the Terminal properties, consisting of about a mile

and a quarter of railroad in the heart of the city, and certain lots and blocks on which were situated passenger station, freight depots, elevators, warehouses, etc.

In the trial court this suit was consolidated with a suit brought by the First National Bank of Montpelier, and other banks, beneficiaries, to foreclose a second mortgage give by the same Company, covering the same property, which was executed on the 24th day of April, 1893, securing notes or bonds to the amount of $750,000.00. The consolidated causes were then tried as one suit.

The Sioux City Terminal Railroad & Warehouse Company was incorporated on the 16th day of September, 1889, by filing Articles of Incorporation under the general incorporation laws of Iowa, which provide, Section 1607:

> "Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided."

Section 1609:

> "Among the powers of such corporations are the following:
>
> 1. To have perpetual succession;
> 2. To sue and be sued by its corporate name;
> 3. To have a common seal, which it may alter at pleasure;
> 4. To render the interests of the stockholders transferable;
> 5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;
> 6. To make contracts, acquire and transfer property—possessing the same powers in such respects as natural persons;
> 7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs."

The objects of the corporation as stated by its Articles were:

> "Article III. This Company shall have power to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed sidetracks, depots, yards, warehouses, storage houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation all needed grounds for right of way, depot purposes and sidetracks, wood and water stations, and to hold, use and control the same, and shall have power to construct, operate and control one or more lines of railway from the depot and yards of the said Company in Sioux City, one to run in an easterly direction to the eastern line of Woodbury County, Iowa, one to run in a westerly direction to the Big Sioux River, and one in a northerly direction to the Iowa State line, and shall have power to lease grounds and buildings, to purchase and hold all needed grounds for the use and purpose of said Company, and to mortgage, lease or sell the said grounds and improvements thereon."

The authorized capital stock of the corporation, provided in its orginal Articles, was $1,000,000.00.

The Sioux City & Northern Railroad Company was the only stockholder in this corporation, and on the 14th day of December, 1889, the Terminal Company made a lease of all its property and franchises to the Sioux City & Northern Railroad Company, for a period of one hundred years, providing in the lease that out of the rental the sum of seventy-five thousand dollars ($75,000.00) should be paid directly by the Railroad Company to this trustee, to be named in a mortgage of $1,250,000.00, the mortgage in suit being then in contemplation.

In addition to this warrant of authority from the only stockholder, there was a meeting of the stockholders of the Terminal Company expressly authorizing the mortgage in suit, and being also authorized by a resolution of the board of

directors, the mortgage was executed on the 1st day of January, 1890, and the trust was formally accepted after the trustee had submitted the matter to able counsel, and had been advised that all proceedings leading up to the issuance of the mortgage were regular and in due form of law.

The bonds secured by the mortgage, amounting to $1,250,000.00, were sold upon the open market to good faith purchasers, for cash, the lowest price received being ninety cents on the dollar.

The moneys derived from the sale of the bonds were forwarded by the appellee to the Union Loan & Trust Company of Sioux City, Iowa, and deposited to the account of the Terminal Company, and all such moneys were used by the Terminal Company in the acquisition of property, the improvement of the same, and the liquidation of its obligations incurred in the purchase and improvement of its properties.

This mortgage was recorded with the Recorder of Deeds of Woodbury County, Iowa, on the 27th day of February, 1890.

The interest upon the bonds secured by this mortgage was regularly paid until the 1st day of January, 1894, through the payment of rentals by the Sioux City & Northern Railroad Company under its hundred year lease.

Some time after the execution of this first mortgage and the sale of the bonds thereunder, the Terminal Company became indebted to various persons and institutions for borrowed money, and on the 24th day of April, 1893, in contemplation of its own insolvency and the insolvency of the various firms and corporations with which it was associated, it made a second mortgage to the Union Loan & Trust Company to secure its floating debt, then amounting to $718,000.00, providing in said mortgage:

> "And the said party of the first part hereby covenants that the said premises are free from all encum-

brance excepting a deed of trust made on the 1st day of January, 1890, by the said party of the first part to the Trust Company of North America of Philadelphia, to secure the sum of $1,250,000.00 of bonds. And the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assigns, against all persons whomsoever lawfully claiming the same, subject to the lien of the said prior deed of trust."

On the 10th day of October, 1893, the First National Bank of Montpelier, and others, beneficiaries under this second mortgage, filed their bill of complaint in the Circuit Court, asking foreclosure of its mortgage, alleging a default in interest, payment of taxes, etc., and asking the appointment of a receiver, under which an order was made appointing a receiver, who, under this appointment, still holds possession of the Terminal Company properties.

On the 17th day of April, 1894, the Trust Company of North America, Trustee, filed its bill of complaint to foreclose the first mortgage because of default in the interest payable on the 1st day of January, 1894, making the maker of the mortgage, the second mortgagee, and various mechanics' lien holders parties defendant.

On the 29th day of September, 1894, the Terminal Company and the beneficiaries under the second mortgage filed their answer, which was amended on the 16th day of October, 1894.

In the meantime the general creditors of these various institutions had incorporated themselves into a company called the Credits Commutation Company, which thereby became the owner of the floating debt of the Terminal Company secured by the second mortgage, and on the 23d day of July, 1895, the Credits Commutation Company took a general judgment against the Terminal Company on the floating debt, in the State Court of Iowa, waiving the mortgage security, and

with leave of court, on the 12th day of August, 1895, the Credits Commutation Company filed its petition of intervention in this suit, claiming on its judgment in the State Court against the Terminal Company, attacking the validity of the first mortgage.

In the meantime, on the 23d day of December, 1893, the Terminal Company, having passed into the control of the representatives of the creditors under the second mortgage, executed a third mortgage or deed of trust to E. H. Hubbard, Trustee, as additional security to the creditors under the second mortgage, covering and embracing all of the property of the Terminal Company, but omitting the clause that it was made "subject to the first mortgage to the Trust Company of North America." E. H. Hubbard, Trustee, having been made a defendant in the foreclosure suit of the first mortgage, joined with the Terminal Company in answering, denying the validity of the first mortgage.

From this statement it will be observed that the subsequent creditors of the Terminal Company present themselves in these various attitudes of attack on the first mortgage: first, as representing the Terminal Company; second, as beneficiaries under the second mortgage; third, as beneficiaries under the third mortgage; fourth, as the Credits Commutation Company holding all the obligations as a general judgment creditor.

In these various defenses many points were made, most of which have been either abandoned or eliminated. The chief reliance now for attack on the validity of the mortgage is based upon a statute of Iowa relative to corporations, providing as follows:

> "Section 1611. Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabili-

ties of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the state, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

The orginal Articles of Incorporation of the Terminal Company in evidence disclose the fact that the capital stock therein provided was $1,000,000.00, and the mortgage being in excess of that amount, it is claimed that the corporation had no power to make it, and it is, therefore, void.

Evidence was not taken on the question as to whether the corporation afterward amended its Articles and increased its capital stock, and the record does not disclose whether such a step was taken. Under the laws of Iowa the corporation had power to so amend. Code, Section 1615, provides:

"Changes in any of the provisions of the Articles may be made at any annual meeting of the stockholders, or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original Articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders."

Under this state of facts a decree of foreclosure was entered by the Circuit Court on the ground that the mortgage was not within the prohibition of the statute of Iowa.

On appeal to the United States Circuit Court of Appeals for the Eighth Circuit this judgment was affirmed on the ground that the giving of the mortgage was not a void act under the statute of Iowa under the interpretation that had been placed upon it by the Supreme Court of that state, and that therefore the doctrine of estoppel was applicable and should be applied.

A writ of certiorari was sued out from this court, and, presumably, the entire case stands for review.

FIRST QUESTION.

THE FIRST QUESTION TO DECIDE IS WHETHER THE MORTGAGE IN CONTROVERSY IS ABSOLUTELY VOID BEING CONTRARY TO PUBLIC POLICY OR BEYOND THE POWER OF THE CORPORATION TO MAKE IT, OR WHETHER IT IS ONLY VOIDABLE FOR THE IRREGULAR EXERCISE OF GENERAL POWERS GRANTED.

If we read the decisions of this court aright there are two well defined, clearly spoken lines of decision, one of which holds that if a contract is absolutely void equity will not enforce it and the doctrine of estoppel cannot be invoked to give it life.

Pullman's Car Co. vs. Transp. Co., 171 U. S., 138, 149.
California National Bank vs. Kennedy, 167 U. S., 362.
McCormick vs. Market Bank, 165 U. S., 539.
Cent. Transp. Co. vs. Pullman's Co., 139 U. S., 24, 60.
Thomas vs. Railroad Co., 101 U. S., 71.

The other equally strong and equally well considered line of authority holds that an irregular exercise of a general power by a corporation cannot be taken advantage of by one who has received and continues to hold the benefits of the contract, and that in all cases where the contract is not absolutely void the doctrines of estoppel are fully applicable.

Bank vs. Matthews, 98 U. S., 621, 629.
Fritts vs. Palmer, 132 U. S., 282, 292.
Logan County Bank vs. Townsend, 139 U. S., 67, 76.
Thompson vs. St. Nicholas Bank, 146 U. S., 240, 251.

FIRST POINT.

WHETHER THIS MORTGAGE IS VOID DEPENDS UPON A PROPER CONSTRUCTION OF THE STATUTES OF IOWA.

In determining whether this mortgage is void it should be constantly borne in mind that there is no constitutional question, no question of general public policy, no abandonment of a public duty, no moral turpitude, no element of fraud, deceit or other evil involved. The sole and only question is whether the legislature of Iowa gave power to this corporation to make this mortgage. It is entirely a matter of statutory construction. The state of Iowa as a sovereign state has an inherent right to frame its own policy regarding the corporations it creates so long as that policy does not contravene the broader public policy of the general government which has been declared.

Such power is an attribute of sovereignty. It flows from the power to create. A creator must have the power to fash-

ion his own creation, as this court has said in effect in many noted cases.

In Bank United States vs. Dandridge, 12 Wheat., 64, it is said:

> "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend for their powers and the mode of exercising them upon the true construction of the statute itself."

In Bank of Augusta vs. Earle, 13 Peters, 519, it is said:

> "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence."

> "The power to create corporations was, in England, vested in the sovereign, to whose powers each of the States of the Union succeeded upon their emancipation from British domination. This sovereign right may, therefore, be exercised by the several States, except so far as their constitutions prohibit, or as may be incompatible with the powers delegated by them to the federal government." 1st Beach Corp., Sec. 2.

This court has repeatedly declared that it can interpret but it cannot make a public policy for the United States or for any State.

License Tax Cases, 5 Wall., 462, 469.

This court can only look to the statute itself and the decisions of the court of last resort in Iowa construing it in determining the validity of the mortgage.

SECOND POINT.

THE INTENTION OF THE LEGISLATURE OF IOWA CAN BE GATHERED FROM THE LANGUAGE OF THE STATUTE

The familiar doctrine of this court that "all contracts made by a corporation beyond the scope of its powers are unlawful and void" can have no application here, for corporations in Iowa are granted the power to borrow money and give mortgage to secure it. The only question is as to the effect of borrowing too much.

It will be conceded that the Terminal Company had the power to borrow $666,000.00, or two-thirds of its capital stock, and give a mortgage upon certain of its property to secure it. The question is raised over the excess.

In construing this statute, we ask the court to consider what is omitted as well as what is declared, as was done in the National Bank cases, where this court laid stress upon the thought that the absence of any provision making the act complained of void was tantamount to a declaration that it should not be held to be void.

In the statute under consideration there is no provision that the excessive debt should be void and uncollectible. Not being declared, there is no presumption it was intended. The power to create debt being general, the limitation to be effective should be specific.

If any doubt of the legislative intent were left it should be dispelled by a subsequent act of the legislature which in effect declares the result to be that not only the corporation but its individual members should be liable for the excessive debt.

> Section 1622. " * * * * If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

THIRD POINT.

THE EFFECT OF THIS STATUTE HAS BEEN SEVERAL TIMES CONSTRUED BY THE SUPREME COURT OF IOWA, AND SUCH CONSTRUCTION SHOULD BE BINDING ON THIS COURT.

The principle is well settled that the decisions of the highest court of a state construing the laws of the state upon which are based mortgages, bonds, corporate powers and rights of property generally, are binding upon the Federal Courts, and constitute a rule of property.

Chicago Railroad vs. Minnesota, 134 U. S., 418, 456.
Union Bk. of Chicago vs. Kan. Bk., 136 U. S., 223, 235.
Etheridge vs. Sperry, 139 U. S., 266, 277.
In Re Duncan, 139 U. S., 449, 462.
Sage vs. Louisiana, 144 U. S., 647, 650.
Morley vs. Lake Shore Railway, 146 U. S., 162, 166.
Bier vs. McGehee, 148 U. S., 137, 142.

The effect of this statute on the validity of this mortgage in a suit between the same parties and relating to the same subject matter has recently been determined by the Supreme Court of Iowa in favor of the validity of the mortgage.

Beach vs. Wakefield, 76 Northwestern Rep., 688 (see also appendix), in which the court said, page 694:

> "A distinction is to be taken between contracts like this and those which, independent of statute, are in violation of public policy. The creation of this indebtedness involved no moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt and to execute a mortgage to secure it. The only ground of complaint is that it went further than the law permitted. Of this the state may complain, but the Terminal Company cannot, nor can any person whose rights are acquired through the Terminal Company, and who acquired such rights with knowledge of the mortgage lien."

Again it is said on page 695:

> "We are aware that the security has been held invalid, and a right of recovery thereon denied in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void, and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases."

This decision is in line with the previous decisions of the Supreme Court of Iowa.

In Garrett vs. Burlington Plow Company, 70 Iowa, 697, 702, the court say:

> "It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claim in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby. Our views above expressed are in harmony with the familiar rules of the law, and are supported by the following decisions of this court: Buell vs. Buckingham, 16 Iowa, 284; Farmers' & Merchants' Bank of Lineville vs. Wasson, 48 Iowa, 336; Hallam & Indianola Hotel Co., 56 Iowa, 178. Decisions of other courts, which need not be cited, are to the same effect."

In Warfield vs. Marshall County Canning Company, 72 Iowa, 666, 672, the court says:

> "The proposition is stated by counsel, but it is not, we think, insisted upon, that the mortgage is ultra vires, because the articles of incorporation provide 'that it shall be competent to mortgage the property of the company to the amount of not exceeding one-half of the capital stock actually paid in.' This question was determined adversely to appellant in Garrett vs. Plow Company, before cited."

In Garrett vs. Plow Company the authorized capital stock of the defendant company was $50,000.00, of which $25,000.00

only was subscribed. The unsecured debts amounted to $21,400.00, at which time the company made a mortgage to secure additional indebtedness in the sum of about $24,000.00, and the Supreme Court of Iowa decided that this mortgage was valid.

In Warfield vs. Canning Company the capital stock of the Canning Company was $6,000.00, and a mortgage upon the entire property of the Company for $10,000.00 was held to be valid.

The construction which the Supreme Court of Iowa has thus uniformly given to this law necessarily entered into and became a part of the contract between the holder of this mortgage and the bondholders which it secured and the corporation.

There is a vested right in the bondholders to these bonds based upon the laws of Iowa as construed by the Supreme Court of that State before the bonds were executed.

FOURTH POINT.

THIS MORTGAGE WAS NOT ULTRA VIRES THE CORPORATION BECAUSE, UNDER THE LAWS OF IOWA, THE CORPORATION HAD THE POWER TO SO AMEND ITS ARTICLES AS TO MAKE IT UNQUESTIONABLY GOOD, AND, THEREFORE, EQUITY WILL SAY IT IS GOOD.

Under the statute quoted granting power to corporations in Iowa to amend their articles, it has been held by the Supreme Court of Iowa that the corporation had the right to amend its articles by increasing its authorized capital stock, thereby validating the previous excessive indebtedness.

Humphreys vs. Patrons' Association, 50 Iowa, 607, 609, in which the court says:

"It does not clearly appear whether notice of the amended articles was published, but no question of that kind is presented in this court, and none appears to have been raised in the court below. The amended articles were recorded, but not until after the transaction in question. It is urged, therefore, by the appellant, that they were not in force at the time of the transaction in question. In support of this view our attention is called to Section 1065 of the Code, which provides that no change shall be made in the articles of incorporation 'unless recorded as the original articles are required to be.' But it appears to us that this provision was made for the protection of those with whom the corporation might deal. Such persons might, doubtless, in a proper case, set up the fact that the amended articles were not recorded. But, where the corporation has assumed to make a contract authorized by the amended articles, and has received the consideration, we do not think it can be allowed to escape the obligation of the contract by setting up a want of record of the amended articles. * * * * The amended articles provide that the company's indebtedness shall be limited to $2,000.00. The fact, however, is that at the time of the transaction in question the company had purchased goods on credit to the amount of $3,000.00, and they had not been paid for. Now it is contended that, if the company had the power to incur indebtedness for goods, it had already incurred as much indebtedness as was authorized, and could not incur any more. * * * * * In our opinion, however, the limit imposed by the amended articles upon the company's power to contract indebtedness would not necessarily have the effect to exempt the company from liability for indebtedness assumed to be contracted in excess of the limit. It has been held, it is true, that a municipal corporation is not liable for indebtedness assumed to be contracted in excess of the limit fixed by the constitution. Carter vs. City of Dubuque, 35 Iowa, 416. But we know of no case where a private corporation has not been held, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed

> by the articles of incorporation. There is good reason for making a distinction between municipal and private corporations in this respect."

The limit of the statute as to capital stock means authorized capital stock, and not paid up capital stock. See

> Trust Co. vs. Columbus Ry. Co., 87 Fed. Rep., 816, 828.

There was no impediment to calling a meeting of the corporation and increasing the authorized capital stock to $2,000,000.00, either before or after the mortgage was given. Under the laws of Iowa the corporation could have done it. Code, Section 1615. (See appendix.) As to whether it in fact did do it the record is silent. The mortgage contained a recital as follows:

> "And whereas, the Sioux City Terminal Railroad & Warehouse Company has full power and authority, under the laws of the state of Iowa, to create this present issue of bonds, and to secure the same by a mortgage upon all the property, leases and franchises." (Record, p. 142.)

And the bonds themselves contained a recital as follows:

> "This bond is one of a series of bonds not exceeding in the aggregate $1,250,000.00, and is secured by a mortgage or deed of trust duly made and delivered by said Company to the Trust Company of North America, Trustee, for the holders of all of said bonds, which said mortgage is the first lien upon the real estate and improvements of the said Terminal Railroad & Warehouse Company, with all the appurtenances and improvements thereon, or to be placed and erected thereon, and all leases, rights, privileges and franchises held by this Company." (Record, p. 144.)

Mr. John Cadwalader, President of the Trust Company testified:

> "Prior to accepting the trust we had all matters which were necessary to the ascertainment of the fact

that the trust deed was a first encumbrance upon a good and clear title, and that the Company making it was fully competent in law to create such an obligation, examined by able counsel whose opinion was given to us in writing. Upon this advice we alone acted." (Record, p. 135, 136.)

Upon these representations the bonds were all sold upon the open market at ninety to ninety-five cents on the dollar, and the moneys paid to the Terminal Company. (Record, p. 125, 129.)

On these facts and this record our position is that the Terminal Company having the power, under the statute of Iowa, to make this mortgage unquestionably good by amending its articles, having recited in the mortgage and bonds that it was good, and having induced large investments upon these representations, it is now and should be estopped from saying that it did not do what it should have done. The plainest principles of equity and good conscience require this rule to be applied.

The case presented is entirely different from that where the law expressly forbids the creation of a debt, as in Scoville vs. Thayer, 105 U. S., 143. In the one case the act is forbidden by the law, and nothing that the corporation can do can make the act valid, while in the other case the corporation is authorized to incur an indebtedness in any amount if the corporation itself, by its stockholders or board of directors, takes certain preliminary steps.

In the Hackensack Water Company vs. Minna De Kay, 36 N. J. Equity, 548, the charter authorized the company to increase its capital to $100,000.00, and to borrow money not exceeding two-thirds of its capital. $2,000.00 of the capital was paid in. A motion was adopted to increase the capital to $100,000.00, but no certificate was filed, and the stock was not

taken. Notwithstanding the fact that the capital was not paid in a mortgage of $66,500.00 was upheld.

On page 568 the court say:

> "In all the external circumstances—competent legislative authority, an orginization de facto, directors and officers de facto, the corporate seal affixed, with the secretary's oath that it was legally affixed—the transaction was perfectly legal. These are the matters which persons dealing in corporate securities are bound to take notice of. The imperfection arose from the omission of acts which the directors should have done in the management of the private business of the company. Those are the matters with respect to which third persons are not obliged to be informed. Finding the power to make the mortgage in the charter, and that the power might be made complete on certain conditions to be performed by the corporation in the management of its internal affairs, third persons would be justified in assuming that such conditions had been complied with, and that everything had been done by the corporation or its directors which was necessary to validate the securities before they were put in circulation. As against a bona fide holder, who has taken upon the faith that the security is what it appears to be, a corporation cannot defend on the ground of such omissions on its part or by its directors."

Central Trust Company vs. Columbus Railway Company, 87 Federal, 816, to foreclose railway bonds amounting to $8,000,000.00 under a statute providing that a corporation might borrow money not exceeding the amount of its capital stock. It was held that a mortgage by a corporation in excess of its capital stock was not void as against a subsequent mortgagee with notice, if upheld by the corporation and its stockholders.

On page 828 it is said:

> "This limitation as to third persons must be regarded as applying to the authorized, and not the subscribed stock."

And also on the same page it is said:

> "The execution of the mortgage was within the general scope of the powers of the corporation, and this objection is only that it is in excess of the limitations imposed upon the exercise of that power. The statute does not declare that indebtedness in excess of capital stock shall be null and void. The corporation and every shareholder consented, and will not, therefore, be heard to complain. The transaction was not on its face immoral, and involved no turpitude. The objection comes from subsequent creditors, who, with knowledge that the indebtedness thus secured was in excess of the authorized capital stock, voluntarily added to that excess, and now seek to sweep out of the way a prior assumption of liability that they may profit by it. Such subsequent creditors stand in the shoes of the mortgagor, and if it could not object, they cannot. For such violation of the limits imposed by law upon the power of the Company to create an indebtedness, the state alone should be heard to complain. The cases holding valid mortgages taken by national banks to secure loans made at the time are in point."

Farmers Loan & Trust Company vs. Toledo Railway Co., 67 Federal Reporter, 49. Under a statute providing that a railroad may borrow money and mortgage its property to an amount not exceeding the amount of the capital stock of the company, and also under a statute providing that a company may increase its capital stock whenever, in the opinion of the directors, the same is insufficient for the construction of its road, etc. The company had issued a sufficient amount of stock to cover the amount of its bonded debt, but the stock had been irregularly issued. It was held that the stockholders were estopped from showing the irregularity. On page 58 the court say:

> "We do not think that the decision of the Supreme Court in Nesbit vs. Riverside Independent Dist., 144 U. S., 610, and kindred cases, in which bonds were held invalid when issued in excess of an absolute limit fixed by statute, as, for example, a percentage of the taxable value of property in a county, have application to a

> case of this sort, where it is plainly within the power of the corporation, by properly increasing its stock, to issue bonds equal in amount to the increase, and where an increase is attempted, and the only defect is an irregularity in the method by which the increase is sought to be made, rather than in a total want of power to secure it."

In Bishop vs. Kent & Stanley Co., 41 Atlantic Reptr., 255, it was held that stockholders may not question a mortgage executed by a corporation in violation of a charter provision that no mortgage shall be made without consent of three-fourths of the stockholders.

On page 257 it is said:

> "We think it is very clear in the first place that the mortgage in question is not void, but at most is only voidable. The making thereof was unquestionably an act within the scope of the corporate powers of the defendant company, although the power to give the mortgage was not exercised in accord with the charter."

In Bank vs. Mining Company, 89 Federal Repr., 440, under a New York statute which authorized the mortgage of realty by a corporation, but requiring the written consent of the stockholders owning at least two-thirds of the stock to be filed with the clerk of the county where the realty was situated, a mortgage of the corporation was upheld, though the assent was not manifested in the statutory way.

On page 446 the court say:

> "Counsel for defendant, in support of his position that contracts made by officers of a corporation without authority cannot be approved by the corporation directly or by implication, cites Central Transportation Company vs. Pullman's Palace Car Company, 139 U. S., 24, and similar cases. The fact that by so many decisions that court has announced an apparently contrary rule should serve as a suggestion to counsel of a distinction in the cases, which is simply that when an

officer, or the corporation itself, attempts to make a contract which is not within the powers of the corporation, which is absolutely contrary to law, it is not merely voidable but void, and cannot be ratified or approved; but when it is one that may be made by the corporation, but is made by an officer without due authority, or when he has not fully complied with the form of the law or the rules of the corporation, when his act is merely tainted with some irregularity, and not repugnant to law, it is only voidable, and may be affirmed or become binding, as before stated."

FIFTH POINT.

THE STATUTE OF IOWA PROHIBITS THE MAKING OF SUCH DEFENSES AS ARE URGED IN THIS CASE.

Section 1636 of the Code of Iowa provides:

> "No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interest, be permitted to set up a want of such legal organization in his defense."

This provision was in force when the bonds and mortgage in question were executed, and had been carried in the statutes of Iowa since 1851.

This statute not only prohibits the corporation from disputing its want of legal organization, but also forbids any person contracting with the corporation to set up a want of such legal organization.

In the cases above cited in the Supreme Court of Iowa, that court doubtless took into consideration the provisions of

this section, and they have in many previous cases rigidly enforced its provisions.

Washington College vs. Drake, 14 Iowa, 14.

Franklin vs. Twogood, 18 Iowa, 515.

Howe Machine Co. vs. Snow, 32 Iowa, 433.

This statute of Iowa seems to have been borrowed from the statutes of Kentucky. The same section was construed by this court in the case of Handley vs. Stutz, 139 U. S., 418, 426, in which this court held that the prohibition against questioning the "want of legal organization" extends to and includes amendments to the charter which the company may be authorized to make.

In that case it was claimed that the stock issued by the Clifton Coal Company, a corporation of Kentucky, in excess of a certain amount, was unauthorized, and that purchasers of such unauthorized issue were not liable therefor.

The law of Kentucky, like the law of Iowa, authorized the corporation to amend its articles of incorporation, and under that act the corporation had the power to amend its articles by increasing the amount of its capital stock. It appears that the corporation took some preliminary steps towards amending its articles to increase the authorized capital, but did not publish notice of such amendment, or record it as required by the laws of that state. It was held that the failure to do so did not make the stock so issued void, and that the purchaser was estopped from disputing its validity, and was liable thereon.

The difference between the Handley case and the case at bar is this: in the case at bar the corporation had issued negotiable bonds to third parties, who purchased in good faith and for value, thereby holding out to such purchasers that everything had been done which the corporation was required

or authorized to do to make those bonds valid, including, if necessary, an amendment to its articles of incorporation; while in Handley vs. Stutz the corporation had not put out any negotiable securities, but had issued stock which was not fully paid for, after having taken preliminary steps to amend its articles, but not having in fact amended them as provided by the laws of Kentucky.

In both cases the act would have been entirely regular and unquestionable if the corporation had performed certain formal acts which the law expressly authorized it to perform.

And, therefore, it is submitted that the principle in the Handley case is applicable to the case at bar, that the construction of the Kentucky statute is equally applicable to our statute, that under it the corporation is estopped from asserting that it failed to do certain acts which it might have done to make the bonds unquestionable.

SIXTH POINT.

THERE IS NO LAW OF IOWA PROHIBITING THE MAKING OF A MORTGAGE, AND IT CAN BE ENFORCED IF THERE IS ANY DEBT SECURED BY IT.

The statute relied on by Appellants does not prohibit the making of a mortgage. The mortgage is in equity an incident to the debt which it was given to secure. Therefore, if there is a debt which can be enforced in any form of an action it is not an invalid debt, and the mortgage securing it is not an invalid mortgage, and the mortgage may be foreclosed in any appropriate form of action.

The present suit is essentially a suit to foreclose a mortgage. The bonds are incidentally mentioned in the bill of

complaint as an evidence of the debt created. The broader relief asked is an accounting between the parties, and a foreclosure of the mortgage for the amount found to be due.

This mortgage was made in Iowa. Under the laws of Iowa its validity is to be determined by the statutes of Iowa as interpreted by the highest court of the state. That court has said in the case of Beach vs. Wakefield, supra, construing this same mortgage:

> "It is the debt which is prohibited and not the mortgage. So long as the debt in any form can be enforced, the mortgage should stand." 76 N. W. R., 695.

The charter of the Company expressly granted the power to make mortgages in any amount. (Art. 13; record, p. 191.)

The record in this case discloses the fact that the Trust Company of North America, Appellant, sent to the Terminal Company the proceeds of the bonds, amounting to ninety per cent. on the first million sold, and ninety-five per cent. on the last two hundred and fifty thousand sold, or a total amount of $1,137,500.00. (Record, pp. 89, 91, 100, 120, 127.) This was the debt which the mortgage was given to secure regardless of whether that debt was evidenced by bonds or not, or whether the bonds were valid or not; and even if the bonds were held invalid, and the contract inhering therein unenforceable, yet if there is a debt of $1,137,500.00 which can be enforced by action on quantum meruit, this mortgage is valid as securing that debt, and, under the broader prayer of the bill in this suit, an accounting may be had, and the mortgage foreclosed for the amount found due.

Pullman's Car Co. vs. Transp. Co., 171 U. S., 138.

SEVENTH POINT.

A PROPER CASE TO APPLY THE DOCTRINE OF ESTOPPEL.

In determining the merit of this case it seems to us that it is important to continually bear in mind the distinction between a contract which may be ultra vires the board of directors, and one which is ultra vires the corporation.

The corporation may do many acts which the board of directors could not, for the very simple reason that the corporation has greater power to validate its acts, and, therefore, has corresponding power to estop itself from questioning the validity of its acts.

In this case the corporation itself has done every possible act in the direction of estoppel. The sole and only stockholder, the Sioux City & Northern Railroad Company, authorized the making of the mortgage; it accepted a lease of all the property for one hundred years which contained a provision reciting this mortgage; it paid interest on the mortgage for three years in the guise of rental under the lease.

The board of directors authorized the mortgage, the mortgage itself recited that all acts had been done to make the mortgage valid, the proceeds of the loan were received by the mortgagor and used in the enhancement of its properties.

Not only is this true, but the creditors who question the validity of the mortgage are also estopped to an equal degree, for they hold no debt, no claim and no equity antecedent to the mortgage. All the obligations which they hold were made over two years after the mortgage was executed. The second mortgage which they first held contained an express provision that it was made subject to the first mortgage. All of their claims were acquired while the first mortgage was on record in the place where the law required it to be recorded. Therefore, if it is possible in any case to apply the doctrine of es-

toppel to the plea of invalidity of such a mortgage, it should be applied in this case, for here we have a combination of all the elements of estoppel.

Every principle of fair dealing and common honesty requires that this mortgage should be enforced against the property. The principle of estoppel should be applied unless there is some inexorable rule of law which forbids it.

Upon the broader principle this court has said in Graves vs. Saline County, 161 U. S., 359, at page 374:

> "It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it may well waive a condition made by itself and not a condition upon the exercise of the power."

The general rule is that where the abstract power exists but formal steps to its exercise have not been observed the estoppel will be applied where benefits have been received and retained.

> Bank vs. Whitney, 103 U. S., 99.
> Thompson vs. Bank, 146 U. S., 240, 251.
> Handley vs. Stutz, 139 U. S., 417 422.

The corporate capacity as to questions like this cannot be raised collaterally or otherwise than by direct proceedings:

> Cowell vs. Springs Company, 100 U. S., 55, 61.
> Fritts vs. Palmer, 132 U. S., 282, 293.

And the estoppel is applied with great force in cases like the one at bar where the securities contain recitals upon their face that they have been executed by authority, and the purchaser is not required to examine other records made by the corporation.

Chaffee vs. Potter, 142 U. S., 355.
Citizens vs. Perry County, 156 U. S., 692.
Andees vs. Ely, 158 U. S., 313, 324.
Evansville vs. Dennet, 161 U. S., 434.

The case falls within the principle established in
Chubbs vs. Upton, 95 U. S., 665.
Veeder vs. Hudgett, 95 N. Y., 295, 310.
Handley vs. Stutz, supra.

In the latter case the court, quoting with approval from the case of Veeder vs. Hudgett, say:

> "But where, as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected, and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

EIGHTH POINT.

THE MORTGAGE IS NOT ULTRA VIRES THE CHARTER.

It was suggested by counsel for appellants that the mortgage might be considered ultra vires the charter and not ultra vires the statute, on the theory that the charter could not be broader than the statute but might be narrower, and in this case sufficiently narrow to forbid the mortgage.

To this proposition the argument already made applies with great force, that a statute of Iowa enabled the corporation to amend its charter at any meeting, and good faith creditors had a right to rely on the corporation doing whatever lay in its power to do to make the mortgage valid.

But in point of fact it cannot be said that the charter is narrower than the statute, for the provision in the charter provided in terms that mortgages upon its real estate were excluded from its limitations. Record, p. 191, Article 13, which provides:

> "The highest amount of indebtedness which this Company shall at any one time subject itself shall not exceed two-thirds of the paid up capital stock of the said Company, aside from the indebtedness secured by mortgage upon the real estate of the Company."

It is evident that this article was framed on the view expressed by Judge Shiras in his opinion foreclosing this mortgage, that the statute of Iowa limiting the debt of corporations excepted from its provisions those debts which were secured by mortgage on real estate.

In our view this question is settled by the Supreme Court of the State adversely to this position in the case of Beach vs. Wakefield above cited, construing this same mortgage, it being there held that the exception of the statue refers only to debenture companies and not to mortgages directly upon real estate.

In view of this holding the article in question could not have the effect of broadening the power, and yet, with this proviso in the article, it cannot fairly be said that the article, and thereby the charter, is narrower than the statute. For, so far as the charter is concerned, the exception leaves it without limitations as to mortgages on real estate.

On the broader question of ultra vires, however, it is immaterial whether it be considered narrower or as broad as the statute. Under either the statute or the charter the corporation had power to create a debt and give a mortgage to secure it, and, therefore, neither a debt nor a mortgage can be considered as absolutely null and void, and if not absolutely null and void, equity will enforce both the debt and the mortgage.

NINTH POINT.

WHAT OTHER COURTS HAVE SAID ABOUT IT.

While, perhaps, this court may not have construed a law or a charter of this character, yet other courts of high character and reputation have had occasion to construe them, and, so far as we know, have uniformly held that where there was power to create some debt, an excessive debt would not be held void, but would be enforced if equity was called upon to apply the doctrine of estoppel.

The following cases are believed to be directly in point construing either statutes or charters similar in phraseology:

Wood vs. Corry Water Works, 44 Fed. Rep., 147.
Poole vs. West Point Assn., 30 Fed. Rep., 520.
Hackensack Co. vs. De Kay, 36 N. J. Eq., 548, 568.
Trust Co. vs. Ry., 87 Fed. Rep., 816, 828.
Farmers & Trust Co. vs. Ry. Co., 67 Fed. Rep., 49, 58.
Bishop vs. Kent, 41 Atlantic Rep., 255.
Bank vs. Mining Co., 89 Fed. Rep., 440, 446.

In conclusion, we desire to say that whatever may be the general view of this court as to the enforcibility of void contracts, and whatever it may believe the true construction of the Iowa statute should have been as an original proposition, this contract should not now be disturbed.

For, prior to the execution of the contract, the highest court of the State had given it its sanction.

The contract was executed on the faith of that construction.

That the faith was well planted is shown by the recent decision of that court ratifying this contract.

The whole fabric of commercial transactions requires such recognition of the powers of the State as will enable men

to do business on the faith of its laws as construed by its highest courts on questions of internal policy.

The underlying principles of our government, the powers reserved in the compact of the States, the just recognition of the right of the highest court of a State to construe its laws are involved in the determination of this suit.

Equity, good conscience and a sound public policy require the upholding of this contract and the affirmance of the United States Circuit Court of Appeals.

Respectfully submitted.

ASA F. CALL,
JOSEPH H. CALL,
Counsel for Appellee.

APPENDIX.

DATES OF MATERIAL TRANSACTIONS.

Sept. 16, 1889. Organization of the Sioux City Terminal R. R. & Warehouse Company. (Record, p. 191.)

Dec. 14, 1889. Transfer of all its stock by "Ter. Co." to the S. C. & Northern R. R. Co., in consideration of franchises. (Record, p. 197.)

Dec. 14, 1889. Lease to S. C. & N. R. R. Co. of all property of Terminal Co. for 100 years. (Record, p. 199.)

Dec. 14, 1889. Meetings of Stockholders and Directors authorizing the mortgage to the Trust Co. of North America. (Record, p. 210.)

Jan. 1, 1890. Mortgage to the Trust Co. of North America. (Record, pp. 140 to 157.)

Oct. 1, 1892 to

May 1, 1893. Floating debt of Terminal Co. incurred. (Record, pp. 78 to 82.)

Apr. 24, 1893. Second mortgage of Terminal Co. to secure its floating debt. (Record, p. 15.)

Oct. 10, 1893. Suit to foreclose second mortgage asking appointment of Receiver. (Record, p. 5.)

Dec. 23, 1893. Sioux City Terminal R. R. & Warehouse Co. executes a third mortgage to secure floating debt. (Record, p. 233.)

Apr. 17, 1894. Trust Co. of North America commenced suit to foreclose the first mortgage. (Record, p. 24.)

June 20, 1894. Order of Circuit Court consolidating the two foreclosure suits. (Record, p. 248.)

July 23, 1895. Judgment in State Court in favor of Credits Commutation Co., owner of floating debt, vs. Terminal Co., waiving mortgages. (Record, p. 83.)

Aug. 12, 1895. Intervention by Credits Commutation Co., owner of general judgment. (Record, p. 65.)

Oct. 5, 1895. Circuit Court renders decree in consolidated causes sustaining first mortgage. (Record, p. 254.)

Aug. 2, 1897. Opinion filed by U. S. Circuit Court of Appeals, affirming Circuit Court. (Record, p. 288.)

Dec. 20, 1897. Writ of Certiorari.

STATUTES OF IOWA RELIED UPON.

Reference being to Code of 1897, which states beneath each section the date of original enactment.

Section 1607. WHO MAY INCORPORATE. Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

Section 1609. POWERS. Among the powers of such corporations are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal, which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;
6. To make contracts, acquire and transfer property—possessing the same powers in such respects as natural persons;
7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs.

Section 1611. LIMIT OF INDEBTEDNESS. Such articles must fix the highest amount of indebtedness or liability

to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the state, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, narrow gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon.

Section 1615. CHANGE OF ARTICLES. Changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders.

Section 1622. FORFEITURE. Any intentional violation by the board of directors or the managing officers of the corporation of the provisions of the two preceding sections shall work a forfeiture of the corporate privileges, to be enforced as provided by law. If the indebtedness of any corpo-

ration shall exceed the amount of indebtedness permitted by law the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess.

Section 1636. ESTOPPEL. No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense.

Section 2041. BONDS—MORTGAGES. Any such corporation may issue its bonds for the construction and equipment of its railway in sums of not less than fifty dollars, payable to bearer or otherwise, with interest not exceeding eight per cent. per annum, and making them convertible into stock, and sell the same at such prices as is thought proper. If such bonds are sold below par they shall, nevertheless, be valid, and no plea of usury shall be allowed in any action or proceeding brought to enforce the collection thereof. Such corporation may also secure the payment of the bonds by mortgages or deeds of trust upon the whole or any part of its property and franchises.

Section 2042. AFTER-ACQUIRED PROPERTY. Such mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them, owned at the time of their date, but all property, real and personal, which may thereafter be acquired, and they shall be as valid and effectual for that purpose as if the property was in possession at the time of their execution.

Section 2049. BONDS SECURED BY MORTGAGE. Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or

in part, to secure bonds issued by it to pay or refund its indebtedness, to improve or develop its property, or for the purpose of effecting the object of its incorporation, to be issued in such amounts, run for such length of time, be payable within or without this state, and bear such rate of interest, not to exceed the legal rate in the state at the time of issue, as the company issuing the same shall determine.

OPINION OF THE SUPREME COURT OF IOWA.

IN THE SUPREME COURT OF IOWA.

FILED OCTOBER 11, 1898.

S. J. BEACH AND CHARLES L. WELD, PARTNERS UNDER THE FIRM NAME OF BEACH & WELD, *Appellee*,

vs.

E. C. WAKEFIELD, ET AL., *Appellee*, WARWICK HOUGH, RECEIVER OF THE SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY, *Appellant*,

AND

THE TRUST COMPANY OF NORTH AMERICA, *Appellant, et al.*

APPEAL FROM WOODBURY DISTRICT COURT.

HON. F. R. GAYNOR, Judge.

* * * * * The Credits Commutation Company, E. H. Hubbard, as assignee, as a grantee in trust of the Terminal Company, and as assignee of the Union Loan and Trust Company, files a cross petition in which he attacks the validity of the mortgage made to the Trust Company of North America, on various grounds which will be mentioned hereafter.

The Union Loan & Trust Company was a second mortgagee of the Terminal property, holding by express stipulation subject to the mortgage of the Trust Company of North America. The Credits Commutation Company was the holder of a considerable floating indebtedness of the Terminal Company.

No foreclosure of either of the mortgages is sought in this action. As a matter of fact, foreclosure proceedings under

the mortgage of the Trust Company of North America are pending in the Federal Court, and the Credits Commutation Company, the Terminal Company and the Union Loan and Trust Company are parties thereto, and have set up there the same matters they are now urging here. That case has been tried in the Federal Circuit Court and in Circuit Court of Appeals, and in both instances the holding was in favor of the validity and priority of the mortgage of the Trust Company of North America. All that is asked in this case by the cross petitioners who complain is that their claims be declared valid and that the first mortgage be held invalid. We might with propriety leave these matters for settlement by the tribunal that has jurisdiction of the foreclosure, were it not for the fact that Wakefield urges the same claim in his behalf. As we permit the Trust Company to question Wakefield's settlement with Garretson, only on the ground of its interest in the Terminal property, it becomes necessary when that interest is denied, to determine whether the Trust Company has a mortgage.

5. It is contended that the mortgage is void, first, because the Terminal Company had no legal right or power to make a mortgage; and in this connection we may also consider the claims made, that it had not the power to mortgage its franchise or to give a lien on after acquired property.

The Terminal Company was, as already said, a railroad company. That it was something more we readily concede, but it was nothing less. Being such, it had the power expressly given in section 1965, McClain's Code, to mortgage its property including its franchise. Sec. 1966 of said Code gives express authority to mortgage after acquired property, and, we may add, that when the power to mortgage exists, the right to incumber after acquired property is necessarily included. Such a mortgage is valid in equity by way of estoppel

on the mortgagor and all persons claiming under him, whether voluntarily or otherwise.

Mitchell vs. Winslow, 2 Story's Rep., 630.
Christy vs. Dana, 34 Cal., 548.
Pennock vs. Coe, 23 How., 117.
1 Jones on Mort's., 152, and cases cited.

6. It is next urged that the mortgage in question is invalid, because the debt it secures is in excess of the amount of indebtedness which the Terminal Company was legally empowered to incur. The capital stock of the company was $1,000,000. We take it that it is only the excess over two-thirds of this sum that can be questioned.

Section 1061, Code of 1873, limits the amount of indebtedness of corporations formed for pecuniary profit to two-thirds of the capital stock. By the 20th G. A., ch. 22, this section was amended by adding the following proviso:

"Provided, That the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this State, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

The 21st G. A., chapter 57, added another proviso in these words:

"Provided, further, That the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unencumbered real estate worth at least twice the amount loaned thereon."

The amount of indebtedness here is largely in excess of two-thirds of the amount of the capital stock, but it is thought by counsel for the Terminal Company that the transaction falls within the terms of the last proviso quoted, and that the indebtedness is therefore sanctioned by law. This was the holding of the Federal Circuit Court on the first trial of the foreclosure proceedings. Bank vs. Terminal Company, 69 Fed. Rep., 441.

We are inclined to think the property mortgaged was, at the time the indebtedness was incurred and the mortgage executed, worth double the amount of the debt, and we cannot agree that a mortgage given by a debtor corporation on its own property was intended to be covered by this proviso. It is a matter of public knowledge, that within a comparatively late period, many companies engaged in the business of making loans on real estate security, have adopted a method of procuring funds to invest, by which they issue their own bonds or debentures which are placed in the hands of a trustee for sale, and which are secured by real estate mortgages, taken by such companies for other loans which they have made. For something on this subject, see: Cook on Stockholders, Sec. 777.

At about the time of the enactment of this amendment companies were operating extensively in Iowa on this system. The amount of indebtedness, where this manner of business was carefully and honestly done, could not under ordinary circumstances prejudice any person interested in the corporation; and we can see good reason for taking such companies out from under the restriction of the original section. We think this proviso applies to a class and not to a condition. That it singles out this particular kind of corporation and is not meant to point out a state of affairs which it was thought might exist with any corporation.

7. The indebtedness for which this mortgage was given, being in excess of the amount fixed by law, it remains to be seen whether complainants have any standing to attack the validity of the transaction. The rights of all these cross petitioners accrued subsequent to the making and recording of this mortgage. While Wakefield's lien, in part is given priority over the mortgage, his contract was made and his work was done after the mortgage was made and with full notice of it. The other complainants are the holders of an indebtedness, that was incurred also in violation of the statute. The Terminal Company, which joins in the attack, has received and still retains the benefit of the funds obtained on this mortgage.

The Circuit Court of Appeals, on appeal from the Federal Circuit Court, of the case between these parties, and which may be found in 82 Fed. Rep., 124, affirmed the lower court but rested its holding upon the ground that complainants could not be heard to assert the invalidity of the Trust Company's mortgage.

The general rule, as stated in Twiss vs. Guaranty Life Ass'n., 87 Iowa, 733 (737), is that "where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice." To like effect are the cases of. Garrett vs. Plow Co., 70 id., 697; Warfield vs. Canning Co., 72 id., 666; Humphreys vs. Patrons Ass'n, 50 id., 607.

In Sedg. Stat. & Const. Law, 73, it is said: "When it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by its charter, a party who has had the benefit of the

agreement, cannot be permitted in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." This language is quoted with approval in Township of Pine Grove vs. Talcott, 19 Wall., 666, and also in Bank vs. Matthews, 98 U. S. S. C., 621. In Poole vs. Butter & Cheese Ass'n, 30 Fed. Rep., 513, the same doctrine was applied to a case where the contract made was in excess of an express statutory grant of power. So, too, in Fritts vs. Palmer, 132 U. S. S. C., 282; Bank vs. Matthews, supra., and Manchester Ry. Co. vs. Concord Ry. Co. (N. H.), 20 Atl. Rep., 383. In this last case the following statement of the law by a learned text writer is approved: "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what he has received. Under these circumstances the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality or there are other reasons of public policy why the courts should refuse to grant relief in the case." See, also, on this subject: Wood vs. Corry W. Works, 44 Fed., 146; Central Trust Co. vs. Railway Co., 23 Fed., 306; Planters Bank vs. Union Bank, 16 Wall., 483; Gold M. Co. vs. Bank, 96 U. S., 640; White vs. Bank, 22 Pick., 181; Whitney vs. Peay, 24 Ark., 22; Whitney Arms Co. vs. Barlow, 63 N. Y., 62; McCarthy vs. Lavasche, 89 Ills., 270; Prairie Lodge vs. Smith, 58 Miss., 301; Oil Creek Co. vs. Transportation Co., 83 Pa. St., 160; Baptist Church vs. Baptist Church, 73 N. Y., 82; Central Trust Co. vs. Railway Co., 23 Fed. Rep., 306; Campbell vs. Aryenta Co., 51 Fed., 1.

A distinction is to be taken between contracts like this and those which independent of statute are in violation of public policy. The creation of this indebtedness involved no

moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt and execute a mortgage to secure it. The only ground of complaint is that it went farther than the law permitted. Of this the state may complain, but the Terminal Company cannot, nor can any person whose rights are derived through the Terminal Company and who acquired such rights with knowledge of the mortgage lien. Oil Tank Co. vs. Trans. Co., supra; Union Water Co. vs. Fluming Co., 22 Cal., 620.

It will not do to say that the lien should be held invalid, but that the Trust Company may have an action for its debt as for money had and received. Such a right is of no value now. The Terminal Company should make restitution before it has standing to complain. It is not enough for it to say that it is insolvent and cannot repay what it has received, but that it will submit to an action on the part of the Trust Company.

We are aware that the security has been held invalid and a right of recovery thereon denied in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void, and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases.

In Garrett vs. Plow Co., supra, the indebtedness exceeded the charter limit of the corporation, and the creditors had notice thereof when the transaction took place; and yet a right of recovery was allowed and the lien of a mortgage upheld. See also: Warfield vs. Canning Co., supra; Jones on Mort., Sec. 127; Morawetz Priv. Copr., 714-716; Allis vs. Jones, 45 Fed., 148, and cases therein cited.

A sound basis appears to exist for this holding. It is the debt which is prohibited and not the mortgage. So long as

the debt in any form can be enforced the mortgage should stand.

8. It is said that the Terminal Company, being a railroad corporation, was quasi public in character, and that the rule stated, which applies to private corporations, should not obtain as against it. It is true that a railroad corporation has a dual character. That in many respects it is of a public nature and that the courts will not enforce against such a corporation a contract which will disable it from performing its duties to the government or the people.

Transp. Co. vs. Pullman P. C. Co., 139 U. S., 24.

But we repeat that this mortgage has no such effect. On the other hand, a railroad company is in many respects a purely private corporation. It is organized in this state, under the same section of the Code which provides for the incorporation of all other companies for pecuniary profit. The restriction as to indebtedness applies to all corporations organized under this section. Under ordinary circumstances, we see no reason for distinguishing between them. It is said, further, that the plea of estoppel can be urged only in favor of the innocent, and that the bondholders here are not of that class, for they are held to notice of the corporate power of the Terminal Company. This rule has been applied in cases where the act done was wholly void because of an absolute want of power to sustain it, and in cases where considerations of public policy intervened. Here, as repeatedly said, the act is voidable only; the statute does not even impose a penalty therefor. The purpose of the law is to protect stockholders against the acts of reckless or dishonest officials of the corporation. In the present instance the stockholders of the Terminal Company are in no wise injured, for, so far as the record discloses, they had the benefit of all the money raised on this mortgage. There is no demand of public policy that this

transaction be held invalid. Many of the cases cited above, in which it is held that the plea of estoppel will lie, are similar to the case at bar in this, that upon its face the act done was in excess of the charter power.

See also on this point:

Matt vs. R. C. M. P., Sec. 70 Iowa, 455.
Wright vs. Pipe Line Co., 101 Pa. St., 204.
Witter vs. G. R. Mill Co. (Wis.), 47 N. W., 729.
Carson Bank vs. Elevator Co. (Mich.), 51 N. W., 641.
Dewey vs. Ry. (Mich.), 51 N. W., 1063, and cases cited.

In this last case the rule as laid down by Morawetz in his work on corporations (Sec. 684) is stated and adopted. That rule is as follows: "It does not follow, because the exercise of certain corporate powers is prohibited by the common law, any corporate act performed in violation of this prohibition will not be recognized by the law as a corporate act. * * * The prohibition of the common law against the unauthorized exercise of corporate powers is based upon the ground of public policy alone, and the effect of this prohibition should be determined by the requirements of public policy; and after a contract made by a corporation in excess of its powers is wholly performed by either party * * * * it cannot be said to be in the interest of public policy to deny the innocent party relief. * * * * General statutory prohibitions against any corporate act not included in the powers conferred by the charter, do nothing more than declare the common law of prohibition against any exercise of corporate powers, which has not been authorized by the legislature, and the common law rule would prevail."

It will be observed that in this case the doctrine stated is applied against a railway company and in favor of a cred-

itor, who, as cross petitioners say, was charged with notice of its charter power.

We might cite many other cases of like character, but it seems needless. The conclusion we have reached on this point, after an examination of numerous authorities, is that the creditor is to be deemed "innocent" whenever the transaction involves no moral wrong on his part and can be carried out without contravening any requirements of public policy.

The Circuit Court of Appeals, passing upon this issue, in the action between these parties, said:

"Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. * * * * These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule, that he who seeks equity must do equity; and upon the principle that he may not at the same time accept the benefits and repudiate the burdens of his contract."

We take this rule to be correct, but we conceive it to be only an indirect assertion of the doctrine of estoppel. All parties who join here in the attack on this mortgage have been benefited by the transaction, for, as we have said, the funds secured thereby were used to improve the property upon which they have their liens, or against which they make their claims.

We think the plea of estoppel is good against the Terminal Company and those claiming under it; but whether we rest the holding in terms upon this ground or upon the general equitable principles stated by the Federal Court the result is the same; the cross petitioners have no standing to object to the bonds or mortgage of the Trust Company.

9. Another point urged against the mortgage is that the instrument as executed was materially different from the form approved by the board of directors of the Terminal Company.

As we have seen, the Terminal Company negotiated the bonds secured by this mortgage and received and appropriated the funds derived from their sale. Under these circumstances it is in no situation now to complain of the terms and conditions of the mortgage. That instrument, if not originally authorized, has been ratified.

Jones on Mort., Sec 127; Hotel Co. vs. Wade, 97 U. S., 13; McCurdy's Appeal, 65 Pa. St., 230; Aurora Soc. vs. Horticultural Soc., 80 Ill., 263.

10. These are the controlling points in the case. Some other questions are discussed by counsel, but we do not deem it necessary that they be specially noticed.

11. Our conclusion upon the whole case is that the Gillette-Herzog Company should have a lien as allowed by the trial court, but that it should rank eleventh in order of priority, as the claims are numbered in the decree; and it should have no personal judgment against Wakefield.

That Wakefield is entitled to a judgment and lien as against the Terminal Company for the sum awarded by the District Court, but that only the amount of $17,475.87, with proportionate interest, should be established as superior to the mortgage of the Trust Company of North America.

With these modifications the decree of the District Court is

AFFIRMED.

Statement of the Case.

debts so contracted, this court holds itself bound by those decisions, without determining whether as an independent question, it would decide that the issue of stock by a corporation, in excess of a statutory inhibition, is not void, but merely voidable.

THE facts which are revelant to the controversy arising on this record are as follows: The Sioux City Terminal Railroad and Warehouse Company (hereafter designated as the Terminal Company) was, in 1889, incorporated under the general laws of the State of Iowa with an authorized capital of one million of dollars. In January, 1890, the corporation, by authority of its board of directors, authorized by its stockholders, mortgaged in favor of the Trust Company of North America its "grounds, franchises, liens, rights, privileges, lines of railway, side tracks, warehouses, storage houses, elevators and other terminal facilities . . . within the corporate limits of the city of Sioux City," all of which property was more fully described in the deed of mortgage. The purpose of the mortgage was to secure an issue of negotiable bonds with the interest to accrue thereon, the bonds being for the face value of one million two hundred and fifty thousand ($1,250,000) dollars. The form of the bonds was described in the deed, and they were numbered from 1 to 1250 inclusive. The deed contained a statement that the corporation "has full power and authority under the laws of the State of Iowa to create this present issue of bonds and to secure the same by mortgage of all its property, leases and franchises." The bonds thus secured were negotiated to innocent purchasers for value and the proceeds were applied to the credit of the company.

In 1893 the Terminal Company also mortgaged in favor of the Union Loan and Trust Company, an Iowa corporation, the property previously mortgaged, as above stated, this second mortgage being to secure one hundred and ninety promissory notes, fifty whereof were for one thousand dollars each and one hundred and forty whereof were for five thousand dollars each, the total aggregating seven hundred and fifty thousand ($750,000) dollars. All the notes referred to in this mortgage bore the date of the deed, which contained

the following covenant: "The said party of the first part (that is, the mortgagor) hereby covenants that the said premises are free from all incumbrances, excepting a deed of trust made on the first day of January, A.D. 1890, by said party of the first part to the Trust Company of North America of Philadelphia, to secure the sum of one million two hundred and fifty thousand ($1,250,000) dollars of bonds, and the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assignees, against all persons whomsoever claiming the same, subject to the lien of the said prior deed of trust."

On the tenth day of October, 1893, in the United States Circuit Court for the Northern District of Iowa, a bill was filed by certain national banks, citizens of other States than the State of Iowa, against the Terminal Company, E. H. Hubbard, as assignee of the Union Loan and Trust Company, and others, having for its object the foreclosure of the second mortgage above referred to. Without fully recapitulating the averments of the bill, it suffices to say that it alleged that the notes which were secured by the second mortgage had been placed in the hands of the Union Loan and Trust Company in part for the benefit of certain claims against the Terminal Company held by the complainants; that the Union Loan and Trust Company had, in April, 1893, made an assignment to E. H. Hubbard for the benefit of all its creditors, and that Hubbard had succeeded to the rights and obligations of the company of which he was assignee, and in which capacity he held the notes secured by the second mortgage, and the benefit of which the complainants were entitled to invoke for the purpose of procuring the payment of their claims. A receiver was prayed for and was appointed.

On the 23d of December, 1893, the Terminal Company, reciting the fact that the notes which were secured by the second mortgage for $750,000 had been drawn, and the mortgage given for the benefit of certain outstanding creditors whose claims amounted to $728,000, and that the notes covered by the second mortgage had been placed in the hands of the Union Loan and Trust Company for the benefit of such

SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY *v.* TRUST COMPANY OF NORTH AMERICA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 192. Argued January 23, 24, 1899. — Decided February 20, 1899.

The Supreme Court of Iowa having repeatedly decided that in that State the fact that a corporation of Iowa contracts a debt in excess of its charter or statutory limitation does not render the debt void, but, on the contrary, such debt is merely voidable, and is enforceable against the corporation and those holding under it, and gives rise only to a right of action on the part of the State because of the violation of the statute, or entails a liability on the officers of the corporation for the excessive

creditors; that the company had made an assignment to Hubbard, assignee, and in that capacity he had received the notes in question; that in a suit pending in the Northern District of Iowa, to foreclose said second mortgage, a question had arisen whether such creditors were entitled to avail themselves of the benefit of the second mortgage. Therefore, in order to allay any such question and to give the creditors intended to be covered by the second mortgage an undoubted right to claim under it, the deed conveyed absolutely to Hubbard, trustee, the property covered by the mortgage, giving to the trustee full power to realize and apply the property and rights to the discharge of the debts secured or intended to be secured as above stated. It suffices, for the purpose of this case, to give this outline of the deed in question, without stating all the various clauses found in it intended to accomplish the purpose which it had in view. The deed, however, contained this declaration: "This conveyance is made, however, with full notice of the assertion of the following claims against the said property, to wit, a certain mortgage or trust deed to the Trust Company of North America, of Philadelphia, Pennsylvania, as trustee, to secure certain bonds for the sum of one million two hundred and fifty thousand ($1,250,000) dollars, and also certain mechanics' liens to the amount of about $55,000, and also certain judgments to the amount of about $20,000. Nor shall said first party (that is, the transferrer) be understood to covenant that there are not other claims than those hereinbefore expressly mentioned, none of which, however, are to be considered and assumed by said second party, (Hubbard, trustee,) nor by the acceptance of this deed is he in anywise held to admit the validity of said trust deed liens, judgments or of any claims made or that may arise thereunder, nor shall this deed be held in any manner to operate as the merger of said mortgage to said Union Loan and Trust Company, but said mortgage shall at all times be kept in full force until all persons and corporations entitled and claiming benefits thereunder shall consent to its discharge, or so long as it may be necessary to keep said mortgage in force for the protection

of the title herein conveyed, or any interest claimed by virtue hereof."

Default having taken place in the payment of the interest on the bonds secured by the first mortgage, the Trust Company of North America, as the trustee, filed its bill in the Circuit Court of the United States for the Northern District of Iowa for foreclosure. On the 20th of June, 1894, the court ordered the two foreclosure suits, that is, the one previously brought by certain national banks in October, 1893, and the one brought by the Trust Company of North America, to be consolidated, and appointed the same person who had been made receiver under the first bill also the receiver under the second. On July 23, 1895, the Credits Commutation Company, a corporation organized under the laws of the State of Iowa, filed its suit against the Terminal Company in the state court of Iowa in and for Woodbury County. It was alleged that the Credits Commutation Company had become the holder and owner of a large number of the claims against the Terminal Company which were intended to be secured by the second mortgage and for whose benefit the deed to Hubbard, trustee, had been made. The relief sought was a judgment against the Terminal Company "without prejudice to any rights or interests which the plaintiff (the Credits Commutation Company) may have as a holder of said notes in the said trust deed;" that is, the deed of trust to Hubbard, trustee, for the benefit of the noteholders as already mentioned. On the day the suit was filed the Terminal Company answered, admitting the correctness of the claim, and judgment was then entered for $692,096.95 with interest, the whole without prejudice to the rights of the parties under the deed of trust as prayed for.

The Terminal Company in its answer to the suit for foreclosure brought by the Trust Company of North America relied upon many defences, only one of which need be referred to, that is, that the bonds and the mortgage in favor of the said Trust Company of North America were *ultra vires*. However, it may be observed that the Terminal Company by its answer asserted that the rights of those entitled to claim

under the second mortgage or the conveyance, made for their benefit to Hubbard, trustee, were paramount to the claims of the Trust Company of North America, or the bondholders under the first mortgage in favor of that company. The Credits Commutation Company intervened in the foreclosure proceedings, averring that the bonds secured by the deed in favor of the Trust Company of North America were void, because the Terminal Company at the time the bonds were executed was without lawful power to issue them or to secure them by mortgage. It was also claimed that in virtue of the judgment rendered in the state court the Credits Commutation Company was a creditor of the Terminal Company to the amount of the judgment, and was entitled to avail itself of the rights accruing to it from the deed of conveyance made by the Terminal Company to Hubbard, trustee, and therefore that the Credits Commutation Company was entitled to be paid from the proceeds of the property sought to be foreclosed before the holders of the bonds secured by the deed which had been made in favor of the Trust Company of North America.

The trial court decided in favor of the validity of the bonds issued to the Trust Company of North America and of the mortgage securing the same. 69 Fed. Rep. 441. On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of the trial court was affirmed. 49 U. S. App. 523. The case then, by the allowance of a writ of certiorari, was brought to this court.

Mr. Henry J. Taylor and *Mr. John C. Coombs* for the Railroad and Warehouse Company.

Mr. Asa F. Call for the Trust Company. *Mr. Joseph H. Call* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The errors assigned and the discussion at the bar confine

the question to be decided solely to the validity of the negotiable bonds of the Terminal Company which were issued to the Trust Company of North America, and which were sold in open market to innocent purchasers for value and the proceeds of which inured to the benefit of the Terminal Company. The issue for decision is restricted to this question, since all the errors assigned and the contentions based upon them depend on the assertion that the bonds issued to the Trust Company of North America, and the mortgage by which their payment was secured, were wholly void. This complete want of power in the Terminal Company is predicated upon certain requirements of the law of the State of Iowa, existing at the time of the incorporation of the Terminal Company, and of a provision in the charter of that company, inserted therein in compliance with the Iowa statute. The law of Iowa relied on is section 1611 of the Iowa Code of 1897, contained in the portion thereof relating to the organization of corporations, and is as follows:

"Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the State, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first

liens upon unencumbered real estate worth at least twice the amount loaned thereon."

The part of the foregoing section commanding the insertion in the charter of incorporated companies of the amount of liability for which the corporation could at one time be subject, and limiting such amount to two thirds of the capital stock, originated in the State of Iowa in the year 1851, and was continuously in force from the time of its adoption in the year in question up to the period when it was embodied in the Code of 1897. Iowa Code, 1851, Title 10, c. 43, § 676; Iowa Code, 1873, Title 9, § 1061. The subsequent portions of the section creating exceptions as to certain classes of railway bonds, and as to bonds secured by an actual transfer of real estate securities, originated, the one March 30, 1884, and the other March 30, in the year 1886, and continued in force until they were also incorporated in the Iowa Code of 1897. 20 Iowa Laws, c. 22; 21 Ib. c. 54. And section 1622 of the Iowa Code also contains the following cognate provision: ". . . If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

The portion of the charter of the Terminal Company fixing, in obedience to the statutory requirement, the amount of the debt which could at any one time exist was as follows:

"The highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

As the sum of the bonds which were issued and secured by the mortgage in favor of the Trust Company of North America exceeded the statutory limit and the amount stated in the charter, the question which arises first for consideration is this: Did this fact render them void; and, secondarily, was the issue of bonds taken from out the operation of the general rule laid down in the statute by the exceptions mentioned in the

latter portions thereof? As the claim that the bonds were void is based on the statutory provisions above referred to, it follows that we are compelled to primarily ascertain the meaning and operation of the state law. In making this inquiry we are constrained in the first place to inquire what construction has been placed upon the Iowa statute by the Supreme Court of that State, for it is an elementary principle that this court in interpreting a state statute will construe and apply it as settled by the court of last resort of the State, and will hence only form an independent judgment, as to the meaning of the state law, when there was no binding construction of such state statute by the court of last resort of the State. *Nobles* v. *Georgia*, 168 U. S. 398; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Morley* v. *Lake Shore and Mich. South. Railway Co.*, 146 U. S. 162, 166, and authorities there cited.

The subject-matter of the creation by an Iowa corporation of a debt in excess of the maximum amount fixed in its charter in accordance with the requirement of the statute, and also in excess of the sum limited by the state law, was considered by the Supreme Court of the State of Iowa in *Garrett* v. *Burlington Plough Co.*, (1886) 70 Iowa, 697. The case was this: An action was brought in chancery to foreclose a mortgage executed by the Burlington Plough Company, an Iowa corporation, to the plaintiff as a trustee for certain of its creditors upon real estate and personal property. The authorized capital stock of the corporation was fifty thousand dollars. The maximum limit imposed by the articles of incorporation was the maximum imposed by the statute, that is, two thirds of the amount of the capital stock. The corporation had contracted an indebtedness in excess of the limitation fixed by the statute and fixed by the charter; that is, with an authorized capital stock of fifty thousand dollars it had contracted an indebtedness exceeding fifty thousand dollars, of which total indebtedness the sums pressed in the foreclosure suit were a part. The defence to the suit was twofold: First, that the total debt of the corporation, including that sued on, was in excess of the two thirds limitation; and, second, that the mortgage was void because it had been granted to protect certain directors

of the corporation to the prejudice of its general creditors. The fact that the debt exceeded the two thirds allowed by the charter and the statute was admitted on the face of the record and stated by the court in its opinion to be unquestioned. The court said (p. 701):

"Do the facts alleged in the answer, that the holders of the notes, as directors of the company, in the management of its affairs, contracted indebtedness beyond the limit prescribed by the articles of incorporation, and caused the mortgage to be executed to secure the amount due them, defeat their security, and give other creditors a right to share in the proceeds of the property mortgaged? We do not understand counsel for defendants to claim that a debt of the corporation beyond the prescribed limits of its indebtedness is invalid, and, if held by a director of the corporation, cannot be enforced for that reason alone. It may be that a director would be answerable to stockholders or others for negligence or mismanagement of the affairs of a corporation whereby debts were contracted in excess of the limitation prescribed in the articles of incorporation; but it cannot be claimed that such a debt, for a consideration received by the corporation, cannot be enforced against it."

Again referring to the same subject, the court said (p. 702):

"It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claims in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby."

In *Warfield* v. *Marshall County Canning Co.*, (1887) 72 Iowa, 666, where a debt had been confessedly contracted by a corporation in excess of its charter limitation, confining the power of the corporation to create a debt to a sum not exceeding one half of the capital stock actually paid in, the court, in considering the legal consequences of such excessive debt, said (p. 672):

"The proposition is stated by counsel, but it is not, we

think, insisted upon, that the mortgage is *ultra vires*, because the articles of incorporation provide 'that it shall be competent to mortgage the property of the company to the amount of not exceeding one half of the capital stock actually paid in.' The question was determined adversely to appellant in *Garrett* v. *Plough Co.*, before cited."

It follows, then, that at the time of the issue of the bonds in favor of the Trust Company of North America, and of the execution of the deed of mortgage by which such bonds were secured, the Supreme Court of the State of Iowa had, in two cases, declared the law of that State to be that a debt contracted in excess of the maximum limitation stated in the charter, in virtue of the provisions of the statute requiring that such maximum limit should be fixed, was not void, although the consequence of contracting a debt beyond the limitation might be to entail upon the officers of the corporation a personal liability for the amount thereof.

Light is thrown upon the condition of the law of the State of Iowa, on the question now before us, by a decision of the Supreme Court of that State, wherein it was called upon to consider issues arising from the identical contracts which are involved in this case. The cause was adjudged in the Supreme Court of Iowa after the decision of the trial court in this cause, and after that of the Circuit Court of Appeals. Without deciding that the construction given the statute by the Supreme Court of the State of Iowa at the time and under the circumstances stated is necessarily controlling on this court, such interpretation, conceding that it is not controlling, is manifestly relevant for the purpose of elucidating the previous decisions of the Supreme Court of Iowa, and as indicating what was the settled law of that State at the time the contract in question was entered into and prior to the time when the controversy which this case presents originated in the courts of the United States. The decision in question is *Beach* v. *Wakefield*, (1898) 76 N. W. Rep. 688, (not yet reported in the official reports of the State of Iowa). The case as stated in the report thereof was this: Beach, a sub-contractor, commenced proceedings to establish and foreclose a mechanic's

lien on a depot built by the Terminal Company. Wakefield was the principal contractor for building the depot. He denied in part the claim of Beach, and sought also on his own behalf to be recognized as having a mechanic's lien upon the depot. The Terminal Company, the Trust Company of North America and the Credits Commutation Company were parties to the cause. The decree of the Supreme Court of Iowa recognized in part a mechanic's lien on the depot building paramount to the mortgage in favor of the Trust Company of North America, but adjudged that the bonds issued to the Trust Company of North America and the mortgage by which they were secured were paramount to the claim of the Credits Commutation Company and others holding junior mortgage rights. In considering the legal result of the creation of a debt in excess of the statutory limitation the court said (p. 694):

"A distinction is to be taken between contracts like this and those which, independent of statute, are in violation of public policy. The creation of this indebtedness involved no moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt, and to execute a mortgage to secure it. The only ground of complaint is that it went further than the law permitted. Of this the State may complain, but the Terminal Company cannot; nor can any person whose rights are derived through the Terminal Company, and who acquired such rights with knowledge of the mortgage lien."

Again, in commenting on the same subject, the court said (p. 695):

"We are aware that the security has been held invalid, and a right of recovery thereon denied, in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases. In *Garrett* v. *Plough Co.*, *supra*, the indebtedness exceeded the charter limit of the corporation, and the creditors had notice

thereof when the transaction took place; and yet a right of recovery was allowed and the lien of the mortgage upheld."

Recurring to the legal consequence, under the Iowa statute, of contracting a debt in excess of the statutory limit, the court said (p. 695):

"It is said further that the plea of estoppel can be urged only in favor of the innocent, and that the bondholders here are not of that class, for they are held to notice of the corporate power of the Terminal Company. This rule has been applied in cases where the act done was wholly void because of an absolute want of power to sustain it and in cases where considerations of public policy intervened. Here, as repeatedly said, the act is voidable only. The statute does not even impose a penalty therefor."

The argument, then, reduces itself to this: Although it was conclusively settled by the decisions of the State of Iowa at the time the contract in question was entered into, that a debt contracted by a corporation in excess of the statutory limitation was in no sense of the word void, but on the contrary was merely voidable, that we nevertheless should, in enforcing the state statute, disregard the construction affixed to it by the Supreme Court of the State of Iowa, and hold that the act of the corporation in exceeding the limit of debt imposed by the statute or fixed in the charter in compliance with the statute was absolutely void. But to so decide would violate the elementary rule previously referred to, under which this court adopts and applies the meaning of a state statute as settled by the court of last resort of the State. As then under the Iowa law, the fact that the corporation contracted a debt in excess of the charter or statutory limitation did not render the debt void, but, on the contrary, such debt, by the settled rule in Iowa, was merely voidable, and was enforceable against the corporation and those holding under it, and gave rise only to a right of action on the part of the State because of the violation of the statute, or entailed, it would seem, a liability on the officers of the corporation for the excessive debt so contracted, it follows that the whole foundation upon which the errors assigned in this court must rest is without support in

respect of Federal law, and therefore the decrees below were correctly rendered.

It is claimed, however, that this court is not obliged to follow the Iowa decisions interpreting the statute of that State, because it is assumed that those decisions proceed alone upon the principle of estoppel. Estoppel, it is argued, is a matter of general and not of local law upon which this court must form an independent conclusion, even although in doing so it may disregard the rule established in the State of Iowa by the Supreme Court of that State. Whatever, it is argued, may be the rule in state courts, in this court it is settled that a corporation cannot be estopped from asserting that it is not bound by a corporate act which is absolutely void, citing, among other cases, *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market National Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24.

But we are not called upon, in the case before us, to decide the question thus raised, since it rests upon an assumption that the court of Iowa has decided that the corporation was by estoppel prevented from complaining of a void act. But the Supreme Court of Iowa has not so decided. On the contrary, whilst in the course of its opinions it has referred to the doctrine of estoppel, it expressly, in the cases cited, made the application of the doctrine depend upon the legal conclusion found by it, that the act of a corporation in contracting a debt in excess of the statutory limit was not void but merely voidable, and for this reason the corporation, or those holding under it, could not be heard to assail the act in question. The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its relation to contracts which were merely voidable. Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow

the settled construction given to it by the Supreme Court of that State.

It necessarily follows that the decrees of the Circuit Court and of the Circuit Court of Appeals were correct, and both are therefore

Affirmed.